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IN THE
Supreme Court of the United States

ORTHOFIX S.R.L., INTER MEDICAL SUPPLIES LIMITED, AND ORTHOFIX INC.,
Petitioners,

v.

EBI MEDICAL SYSTEMS, INC., ELECTRO-BIOLOGY, INC., AND BIOMET, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The federal district court below entered an award of punitive damages in an amount approximately equal to the compensatory damages award. The combined award required respondents to disgorge the profits of their unlawful conduct. On appeal, a sharply divided panel of the United States Court of Appeals for the Third Circuit reviewed the punitive damages award *de novo,* rejected the jury's and the district court's determinations of reprehensibility, and reduced the punitive damages award to two percent of the compensatory damages award. The three questions presented are:

1. Whether the standard for appellate review of punitive damages awards challenged as unconstitutionally excessive under *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996), is *de novo* (as the Third Circuit held in this case and as the Eighth Circuit holds) or deferential (as the Second, Ninth, and Eleventh Circuits hold).

2. Whether a punitive damages award that bears a one-to-one ratio to the compensatory damages award and requires defendants to disgorge no more than the profits obtained from their unlawful conduct can be unconstitutionally excessive as a matter of law under *BMW of North America, Inc. v. Gore.*

3. Whether a federal court, upon finding a punitive damages award to be unconstitutionally excessive, has the power to order an outright reduction of the award to a specified lower amount (as the Third Circuit held in this case and as the Eleventh Circuit holds) or must instead give the plaintiff the option of electing a new trial on punitive damages (as the Second and Tenth Circuits hold).

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioners' parent company is Orthofix International N.V. None of petitioners own subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Orthofix S.r.l., Inter Medical Supplies Limited, and Orthofix Inc. (collectively "Orthofix") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (App., *infra*, 64a-107a) is reported at 975 F. Supp. 681. The opinion of the United States Court of Appeals for the Third Circuit (App., *infra*, 1a-63a) is reported at 181 F.3d 446.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1999. Petitions for rehearing were denied on July 23, 1999. App., *infra,* 109a, 111a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clauses of the Fifth and Fourteenth Amendments and the Seventh Amendment to the U.S. Constitution are reproduced at App., *infra,* 112a.

STATEMENT

A New Jersey jury reached a unanimous verdict that two New Jersey corporations and their Indiana parent corporation breached three contracts and committed eight business torts against two foreign corporations and a (non-New Jersey) U.S. subsidiary. The jury awarded compensatory damages of $48 million and punitive damages of $100.6 million. Under New Jersey's strict Punitive Damages Act, the jury found by "clear and convincing evidence" that the local corporations' tortious conduct was "actuated by actual malice" or "a wanton and willful disregard of persons who foreseeably might be harmed." App., *infra,* 117a.

On post-trial motions, the federal district court rejected the challenges to the jury's verdict on liability and compensatory damages. Relying on the guideposts this Court set forth in *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996), the district court also rejected the challenge to the punitive damages award as unconstitutionally excessive. Under New Jersey's Punitive Damages Act, however, the district court conditionally remitted the punitive damages award from $100.6 million to $50 million, an amount approximately equal to the

compensatory damages award of $48 million. The combined award of $98 million was equal to the profits generated by the unlawful conduct.

On appeal, a sharply divided panel of the United States Court of Appeals for the Third Circuit subjected the remitted punitive damages award to "intensive review" (App., *infra,* 44a), rejected the jury's and district court's determinations of reprehensibility, and reduced the punitive damages award by 98%—from $50 million to $1 million—to an amount equal to two percent of the compensatory damages award.

A. The Jury's Special Verdict

After two months of trial and more than two days of deliberations, a jury unanimously returned a special verdict and found that Respondents EBI Medical Systems, Inc., Electro-Biology, Inc., and Biomet, Inc. (collectively, "EBI") had breached three contracts and perpetrated eight business torts in a successful scheme to steal Orthofix's U.S. market for external bone fixators ("bone fixators")—a medical device used to heal complex bone fractures. The jury awarded Orthofix $48 million in compensatory damages and $100.6 million in punitive damages. App., *infra,* 113a-22a.[1]

The evidence before the jury, the sufficiency of which is not in dispute, proved (among other unlawful acts) that EBI developed a competing bone fixator at the same time that it was legally obligated to handle Orthofix's bone fixator exclusively; that EBI deliberately deceived orthopedic surgeons and hospitals by passing off its knock-off bone fixator as a genuine Orthofix bone fixator; and

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[1] The district court's jurisdiction rested on 28 U.S.C. §§ 1331 (federal question), 1332 (diversity of citizenship), 1338 (trademark and unfair competition), and 1367 (supplemental jurisdiction).

that EBI tortiously interfered with Orthofix's contractual relationships by reverse-engineering thousands of counterfeit bone fixators and selling them in response to hospitals' orders for genuine Orthofix bone fixators. App., *infra*, 6a-8a, 24a-27a, 64a-65a, 67a, 70a, 86a-89a; Orthofix's C.A. Br. 2-11.

EBI's unlawful conduct caused Orthofix to lose $48 million in profits and unjustly enriched EBI by $98 million. App., *infra*, 2a, 65a, 101a; Orthofix's C.A. Br. 13 & n.8.[2]

B. The District Court's Remittitur

The district court rejected EBI's post-trial challenges to the jury's determinations of liability and compensatory damages. With respect to EBI's challenge to the jury's award of punitive damages, the district court held that $100.6 million was not unconstitutionally excessive under the guideposts this Court set out in *Gore*. Exercising its authority under the New Jersey Punitive Damages Act, however, the district court conditionally remitted the award of punitive damages to $50 million. App., *infra*, 65a, 106a.

The district court "conclude[d] that the jury's award of punitive damages in this case does not run afoul of the Constitution." App., *infra*, 92a. Referring to the *Gore*

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[2] At trial, EBI did not dispute that Orthofix's U.S. market was worth $98 million or that EBI was enriched by that amount. Orthofix's C.A. Br. 13 n.8. It asserted only that its conduct was lawful, an assertion that the jury rejected.

The difference between Orthofix's lost profits and EBI's unjust enrichment is explained by the jury's apparent finding that Orthofix would have lost some portion of its U.S. market to competitors other than EBI, even if EBI had acted lawfully. In the transition from EBI to Orthofix's new U.S. distributor, some of Orthofix's customers would have strayed to bone fixators made by manufacturers other than Orthofix. Trial Transcript ("Tr.") 1338:22; 1339; 12-13.

guideposts, the district court noted that "the degree of reprehensibility of the defendant's conduct is critical to the analysis" (App., *infra,* 91a) and explained that the proof was sufficient to support the jury's finding, by clear and convincing evidence, that EBI had acted with " 'actual malice' or 'wanton and willful disregard' of persons who might be harmed by the defendant's acts or omissions" (*id.* at 86a). Among other malicious conduct, the district court quoted EBI's intention to "destroy Orthofix" and its sales force's "lie[s] to doctors and hospitals . . . to isolate Orthofix and capture the U.S. market for external fixators for EBI." *Id.* at 87a-88a.

With reference to *Gore*'s ratio guidepost, the district court observed that, "[a]s *Gore* came to the Supreme Court, the punitive award was 500 times the amount of compensatory damages," whereas "[i]n this case, the ratio is closer to two to one." App., *infra,* 92a. "In sum, there is nothing about the ratio of punitive damages to the compensatory damages in this case that 'jar[s] one's constitutional sensibilities.' " *Id.* (internal quotations and brackets in original; quoting *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1, 18 (1991)).[3]

Although the jury's $100.6 million punitive damages award passed constitutional muster, the district court

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[3] The district court also reasoned that "potential, rather than actual economic loss may be a factor in determining whether the punitive damages award passes constitutional muster" and cited Orthofix's "attractive arguments" that EBI stood to gain more than $150 million by stealing Orthofix's U.S. bone fixator market. App., *infra,* 92a n.8; *see* C.A. App. 1928-29 (calculating the potential profits from EBI's unlawful conduct at $157 million). Although the district court thought it appropriate to consider "the ratio of the punitive award to the threatened harm when reviewing the *constitutionality* of a punitive damages award," it concluded that New Jersey's Punitive Damages Act limited the jury's consideration to EBI's actual unjust enrichment of $98 million. App., *infra,* 92a & n.8 (emphasis added; citing *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 462 (1993)).

ordered a conditional remittitur to $50 million under New Jersey's Punitive Damages Act, N.J. STAT. ANN. § 2A:15-5.9 to -5.17. That Act requires the trial judge to ascertain that the award is "reasonable in its amount and justified in the circumstances of the case." App., *infra*, 97a-98a. The district court explained that, as a consequence of New Jersey's tort-reform statute, "an award may be so large that it will not survive the review mandated under New Jersey's Punitive Damages Act, although the award is not unconstitutional." App., *infra*, 98a n.16.[4]

On the facts of this case, the district court held that "in view of the factors which must be considered under New Jersey law in setting the amount of a punitive damages award, . . . the maximum amount of punitive damages a jury could award, which would be reasonable and justified in these circumstances, would be fifty million dollars." App., *infra*, 105a. In so holding, the district court placed substantial emphasis on the fact that New Jersey's Punitive Damages Act requires consideration of "the profitability of the defendants' misconduct" and that EBI—"by securing for [itself] the market in bone fixators which had previously been Orthofix's"—"profited by 'approximately 97 million dollars.'" App., *infra*, 101a (quoting Tr. 1280); *see* App., *infra*, 105a-06a n.20.

Even though New Jersey's Punitive Damages Act authorizes the "trial judge" to "reduce the amount of"

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[4] New Jersey's Punitive Damages Act also caps punitive damages at the greater of $350,000 or five times compensatory damages (App., *infra*, 103a), requires the plaintiff to prove its entitlement to punitive damages by "clear and convincing evidence" (*id.* at 86a), abolishes joint and several liability for punitive damages (*id.* at 93a), abolishes punitive damages based on nominal damages or injunctive relief (N.J. STAT. ANN. § 2A:15-5.13(c) & -5.14(b)), and allows the defendant to elect to bifurcate the trial (*id.* § 2A:15-5.13(a)).

punitive damages (App., *infra,* 97a-98a), the district court, recognizing that it was a federal court bound by the Seventh Amendment, ordered a new trial "limited to the issue of punitive damages" unless Orthofix accepted a remittitur of the punitive damages awarded in excess of $50 million (App., *infra,* 106a). Orthofix accepted the remittitur, and EBI appealed.

C. The Court of Appeals' Decision

On appeal, a three-judge panel of the United States Court of Appeals for the Third Circuit unanimously affirmed the district court's judgment as to liability and compensatory damages. As to punitive damages, however, the panel divided sharply. The majority ordered that the amount of punitive damages be reduced from $50 million to $1 million. App., *infra,* 1a-63a.

The majority believed that it was obligated to apply "intensive review." App., *infra,* 44a. Although appeals courts have traditionally reviewed punitive damages awards under a deferential abuse-of-discretion standard, the majority believed that it had been appointed the "gatekeeper" of punitive damages awards (*id.* at 3a, 40a) and that "the Supreme Court's [punitive damages] jurisprudence . . . counsels intensive review" to determine whether an award is unconstitutionally excessive (*id.* at 44a). Accordingly, "[t]o the extent that the issues EBI raises have a legal component, our review is plenary." *Id.* at 31a. In performing such plenary review, the majority held that an appellate court "must rely on its combined experience and judgment" in determining whether—and by how much—a punitive damages award is excessive. *Id.* at 41a.

Applying its standard of "intensive review" (App., *infra,* 44a), the majority reexamined the jury's and district court's determinations of the reprehensibility of EBI's

conduct and concluded, in its "combined experience and judgment," that "the proper, reasonable punitive damages award is no more than $1 million." *Id.* at 41a. Although the majority noted that *Gore* set forth three guideposts for determining whether a punitive damages award is unconstitutionally excessive—namely, the reprehensibility of the defendant's conduct, the ratio of the punitive damages award to the actual harm inflicted on the plaintiff, and the legislative sanctions for comparable misconduct (App., *infra*, 35a-37a)—it "concluded that the punitive damages award should be reduced in light of the first guidepost" (*id.* at 40a). The majority acknowledged that "the full [compensatory damages] award is properly attributable to the tortious conduct" (*id.* at 31a)—which meant that the ratio of punitive to compensatory damages was approximately one-to-one. But "balancing these facts with respect to reprehensibility, we conclude that EBI's conduct, which inflicted only economic harm for which large compensatory damages have been awarded, was not sufficiently egregious to warrant a punitive damages award of $50 million." *Id.* at 39a. The majority then announced, without intermediate analysis, that "based upon the guideposts established by the Supreme Court . . . we conclude that an award greater than $1 million is not 'reasonably necessary to punish and deter.'" *Id.* at 44a-45a (quoting *Haslip*, 499 U.S. at 22). It instructed the district court to "enter a judgment for punitive damages" in that amount. App., *infra*, 45a.[5]

Senior Circuit Judge Leonard Garth dissented. He wrote that he was "compelled to disagree with the ma-

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[5] The panel majority did not mention the $98 million by which EBI had profited from its unlawful conduct, perhaps because unjust enrichment was not one of the three guideposts set forth in *Gore* and its "decision in this case to reduce the punitive damages award even further is based upon the guideposts established by the Supreme Court." App., *infra*, 44a.

jority's reduction of the punitive damages assessed against EBI not only because that monetary reduction has no principled basis, but also because the standard of review that this Court has previously established and announced has been totally ignored." App., *infra*, 47a. Judge Garth reasoned that "the trial judge is in the best position to oversee whether the jury verdict is rationally based" (*id.* at 50a) and that the appellate court should review the district court's remittitur decision only for abuse of discretion (*id.* at 50a, 53a). Quoting this Court's decision in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989), Judge Garth explained that "an appellate court has a 'limited function' and . . . should 'continue to accord considerable deference' to the district courts." App., *infra*, 56a. He observed that the majority "fail[ed] to give any deference" to the district court's judgment. *Id.* at 57a.

Under the properly deferential standard of review, Judge Garth would have affirmed the remitted award of punitive damages. App., *infra*, 50a, 59a ($50,000,000 remitted punitive damages award, "when compared to the compensatory damages of $48,000,000, is essentially a 1:1 ratio, and well within the guidepost of *BMW*"), 63a. He wrote that he was "hard pressed" to understand the majority's conclusion that EBI's conduct was not sufficiently reprehensible "in light of the jury findings of egregious, intentional and deceitful behavior by EBI, and by the lack of record evidence in the majority opinion which could shore up such a reduced award." *Id.* at 52a. He listed the jury's 22 special verdict findings (*id.* at 48a, 52a-53a) and concluded that the evidence underlying those findings, "which the majority credits, is more than sufficient to justify the jury's finding of reprehensible conduct, which is the 'most important indicium' among the guideposts" and the only one on which the majority relied

to reduce the award of punitive damages (*id.* at 58a (quoting *Gore*, 517 U.S. at 575; citation omitted)).

In addition, Judge Garth pointed out that "evidence produced at trial, but not mentioned in the majority opinion, indicated that EBI's conduct could involve potential physical harm to the wider community as well as economic harm." App., *infra*, 57a. The majority, however, chose to "disregard" that evidence. *Id.* at 58a.[6]

"[R]ather than confining itself to the 'limits that bind judges in their judicial function,'" Judge Garth stated that "the majority has followed its own 'merely personal and private judgment.'" App., *infra*, 61a (quoting *Rochin v. California*, 342 U.S. 165, 170 (1952)). He explained that the majority's decision "alarmingly requires . . . that an appellate panel 'must rely on its combined experience and judgment' when reducing a remittitur." App., *infra*, 60a. Under that standard, the majority had "substituted its personal judgment for a principled review function over a District Court's discretion; and without relying on record evidence, it has reached a bottom line 'lottery' figure of $1,000,000 relying on its own 'experience and judgment.'" *Id.* at 62a; *see id.* at 47a, 49a, 51a, 54a ("no endeavor on the part of the majority even to acknowledge the specific findings made by the jury and to analyze the District Court's opinion"), 57a ("arbitrary

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[6] Judge Garth described that evidence (App., *infra*, 57a-58a):

> EBI was found liable for passing off its own products as those of Orthofix, a recognized and respected manufacturer of bone fixators. There is evidence in the record that on at least one occasion, the deceptive substitution of EBI bone screws and ankle clamps for use in conjunction with Orthofix fixators could have injured patients. Therefore, the jury could well have concluded that the deceptive practices engaged in by EBI not only caused economic damages to Orthofix, but also exposed orthopedic patients to increased harm . . . .

reduction"). Judge Garth chastised the majority for " 'willy-nilly,' in an effort to reach what it considers to be the 'right figure,' arbitrarily pull[ing] a punitive damage award from the air as if it were a lottery number and announc[ing] 'in our judgment,' this is it!" *Id.* at 61a-62a; *see id.* at 60a ("conclusory fashion"; *ipse dixit* conclusion"). After the majority's decision, Judge Garth warned, "no analysis aside from an *ad hoc* panel's 'combined experience and judgment' is required in reviewing a district court's remittitur." *Id.* at 62a; *see id.* at 61a (majority's standard provides "no instruction to the trial courts or litigants").[7]

REASONS FOR GRANTING THE PETITION

This case presents the question that this Court expressly reserved for future decision in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994), and did not pass on in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)—namely, under what standard should courts review punitive damages awards that are alleged to be unconstitutionally excessive? The United States Courts of Appeals for the Second and Ninth Circuits review district court excessiveness determinations for abuse of discretion. The United States Court of Appeals for the Eleventh Circuit reviews district courts' reprehensibility determinations and other factual findings underlying punitive damages awards only for clear error.

In conflict with the Second, Ninth, and Eleventh Circuits, the Third Circuit below subjected the punitive damages award to "intensive review," rejected the jury's and district court's reprehensibility determinations, and re-

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[7] Orthofix petitioned for rehearing on the three issues that are presented in this petition. Its petition was denied. Senior Circuit Judge Garth voted for panel rehearing. Chief Judge Becker voted to rehear the case *en banc*. App., *infra*, 111a.

duced the punitive damages award by 98% from $50 million to $1 million. App., *infra*, 44a, 31a, 39a, 41a, 45a. Only the Eighth Circuit applies a similar *de novo* standard of review.

The conflict among the circuits over the standard of appellate review puts the Third and Eighth Circuits in the position of micromanaging punitive damages awards in a manner that exceeds their authority under the Due Process Clause and violates the Seventh Amendment. What is more, it threatens to turn federal due-process scrutiny of punitive damages awards from a means of reducing arbitrary awards into a source of new disparities, to suffocate state tort reform efforts, and to encourage wasteful appeals of punitive damages awards by defendants in search of a second opinion from the federal appellate court.

This case also presents two other questions that have divided the lower courts since *Gore*. One question concerns *Gore*'s ratio guidepost and the role that the profitability of the defendant's unlawful conduct has in its application. A statistical study indicates that the ratio between punitive and compensatory damages awards has become less predictable after *Gore* and that awards bearing either high or low ratios to the amount of compensatory damages have increased. In addition, the lower courts are confused about how *Gore*'s ratio guidepost accounts (if at all) for the defendant's unjust enrichment. The decision below exemplifies that confusion. The majority virtually eliminated the punitive damages award, even though the ratio of punitive to compensatory damages was approximately one to one and the district court found that the combined award merely took away the profits respondents had obtained from their unlawful conduct. App., *infra*, 101a. Review of the judgment below would help settle the confusion over *Gore*'s ratio guidepost and the role that the profitability of the defendant's unlawful conduct has in its application.

Lastly, this case presents the question whether the reviewing court has the power to reduce a punitive damages award that it finds to be unconstitutionally excessive or must instead order a conditional remittitur and offer the plaintiff a new trial. The courts of appeal that have addressed this question are evenly split. The Second and Tenth Circuits have held that the Seventh Amendment requires federal courts to conditionally remit an unconstitutionally excessive award or order a new trial. By contrast, the Third Circuit below (App., *infra*, 45a) and the Eleventh Circuit hold that a reviewing court may peremptorily reduce such an award. Although this Court has not addressed the precise question presented by this case, its holding in *Hetzel v. Prince William County*, 523 U.S. 208, 118 S. Ct. 1210 (1998) (per curiam), strongly suggests that the judgment below cannot be squared with the Seventh Amendment. In *Hetzel*, this Court held that a court of appeals' reduction of an excessive *compensatory* damages award, "without allowing petitioner the option of a new trial, cannot be squared with the Seventh Amendment." *Id.* at —, 118 S. Ct. at 1212. In light of the numerous constitutional challenges to punitive damages awards in the wake of *Gore*, the remedial question presented by this case has considerable practical importance.

I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE THE STANDARD FOR APPELLATE REVIEW OF CHALLENGES TO PUNITIVE DAMAGES AWARDS UNDER *GORE*

The Third Circuit's "intensive" standard of review conflicts with the decisions of other federal circuit courts, is in tension with this Court's decisions in *Browning-Ferris* and *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), and threatens to increase arbitrary punitive damages awards.

A. The Third Circuit's Decision Conflicts With The Decisions Of Other Federal Circuit Courts Of Appeals

Five regional circuit courts of appeals have passed on the question of the appropriate standard governing appellate review of excessiveness challenges under *Gore*. The five courts of appeals have supplied three different answers. The Second and Ninth Circuits review district court determinations for abuse of discretion. The Eleventh Circuit treats such determinations as raising a question of law, but reviews the underlying factual findings only for clear error. The Third Circuit below, recently joined by the Eighth Circuit, exercises *de novo* review.

1. The Second and Ninth Circuits review constitutional excessiveness determinations rendered by the district courts for abuse of discretion. In *Lee v. Edwards*, 101 F.3d 805 (1996), the Second Circuit held that "[w]e review for *abuse of discretion* a district court's ruling that a punitive damage award does not 'shock the judicial conscience.'" *Id.* at 808 (citation omitted; emphasis added). The Second Circuit understood this Court's decision in *Gore* as "erect[ing] three guideposts that should assist us in the application of our standard, by which we deem excessive a punitive damage award that 'shocks our judicial conscience.'" 101 F.3d at 808 (citation omitted). "[I]n light of the *Gore* factors and our comparison of this award with other punitive damage awards," the Second Circuit concluded that the punitive damages award in that case was unconstitutionally excessive and that "the district court *abused its discretion* in refusing to grant a new trial on that issue." 101 F.3d at 813 (emphasis added).

Likewise, in *Pavon v. Swift Transportation Co.*, No. 98-35119, 1999 WL 729132 (Sept. 20, 1999), the Ninth Circuit affirmed the district court's decision rejecting an

excessiveness challenge based on *Gore* under an "abuse-of-discretion standard" (*id.* at *5 (quoting *Browning-Ferris*, 492 U.S. at 279; internal quotation marks omitted)):

> In reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard.

Applying the abuse-of-discretion standard, the Ninth Circuit measured the punitive damages award before it against "the three factors set out in" *Gore*. *Pavon*, 1999 WL 729132, at *5-*6. With respect to each factor, the Ninth Circuit asked what "a reasonable jury could determine" and deferred to what "the trial court found that the jury could have found." *Id.* at *5.[8]

2. Although the Eleventh Circuit holds that the "abuse of discretion standard is inapplicable" to excessiveness challenges invoking *Gore*, it also holds that "[i]n perform-

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[8] In addition to the Second and Ninth Circuits, the Supreme Courts of Kentucky and Wisconsin similarly hold that trial court determinations of excessiveness challenges under *Gore* are subject to deferential review. *See Owens-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409, 415 (Ky. 1998) (holding that trial court's determination as to whether punitive damages award was constitutionally excessive is subject to clearly erroneous standard of review, and that such review "affords a defendant the due process protections mandated in *Honda Motor Co., Ltd. v. Oberg*"); *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 557 N.W.2d 67, 81 (Wis. 1996) (holding that the proper standard of review of a trial court's remittitur order is the same under *Gore* as it is under state law, namely: "a reviewing court will reverse a circuit court's remittitur order only if it determines that the circuit court erroneously exercised its discretion" (citations omitted)).

ing this review . . . we shall accept the district court's findings of fact unless they are clearly erroneous." *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1334 (11th Cir. 1999). For example, with respect to the district court's determination of the degree of reprehensibility of the defendant's conduct under the first *Gore* guidepost, the Eleventh Circuit holds that deference is owed:

> Although the "proper characterization of a question as one of fact or law is sometimes slippery," the degree of reprehensibility of the defendant's conduct is essentially a judgment about facts. Such judgments are properly the role of the district court and we will not second guess the judge who sat through the trial, heard the testimony, observed the witnesses and had the "unique opportunity to consider the evidence in the living courtroom context" while we have only the "cold paper record."

170 F.3d at 1335 (quoting *Gasperini*, 518 U.S. at 438; citation omitted). Applying that deferential standard, the Eleventh Circuit declined to disturb the district court's determination that the defendant's conduct was reprehensible enough to justify a punitive damages award of $4 million, which bore a 100-to-1 ratio to the compensatory damages award.[9]

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[9] Although the Third Circuit below cited *Johansen* in support of its statement that "our review is plenary" (App., *infra*, 31a), the quotation from *Johansen* in text makes clear that the Eleventh Circuit did not endorse *de novo* reexamination of the jury's and district court's reprehensibility determinations such as that undertaken by the majority below.

On October 12, 1999, this Court denied the defendant's petition in *Johansen, sub nom. Combustion Engineering, Inc. v. McGill, et al.*, No. 99-252 (U.S. Oct. 12, 1999). The defendant's petition to this Court did not present the question of the appropriate standard of appellate review, but asked only whether a 100-to-1 ratio of punitive damages to compensatory damages was unconstitutionally excessive.

3. The decision of the Third Circuit below created a conflict among the courts of appeals by applying "intensive review" (App., *infra*, 44a) and "fail[ing] to give any deference" to the jury's verdict or district court's judgment (*id.* at 57a (Garth, J., dissenting)).

A few weeks after the Third Circuit's decision, the Eighth Circuit joined the Third Circuit and held that "[w]e review the district court's conclusions [regarding whether a punitive damages award is unconstitutionally excessive] de novo." *United States v. Big D Enterprises, Inc.*, 184 F.3d 924, 932-33 (8th Cir. 1999). The courts of appeals are thus plainly divided over the appropriate standard of appellate review under *Gore*.

B. The Third Circuit's Decision Is In Tension With This Court's Decisions In *Browning-Ferris* And *Gasperini*

In *Browning-Ferris*, this Court held that appellate courts should "accord considerable deference" to the district court's determination regarding the excessiveness of a punitive damages award under federal common law and "review the district court's determination under an abuse-of-discretion standard." 492 U.S. at 279-80. In *Gasperini*, this Court held that an appellate court may reverse a district court's determination regarding the excessiveness of a compensatory damages award only "because of an abuse of discretion" and that it "must give the benefit of every doubt to the judgment of the trial judge." 518 U.S. at 438-39 (internal quotation and citation omitted); *see id.* at 448 (Stevens, J., dissenting) (accepting the *Gasperini* majority's abuse-of-discretion standard).

Pet. for Cert., No. 99-252 (filed Aug. 11, 1999). The brief in opposition recalculated the ratio at one to six—contending that the punitive damages award was a small fraction of the compensatory damages award. Br. in Opp. 22, No. 99-252 (filed Sep. 10, 1999). The Court denied review of that fact-bound challenge.

This Court gave no indication in *Gore* that it meant to change this well-settled standard in the context of constitutional excessiveness review of punitive damages awards. Nor is there any basis for doing so. This Court has stressed that a deferential standard of appellate review is supported by long-standing historical practice, the "limited function" of federal appellate courts, and "the strictures of the Seventh Amendment." *Browning-Ferris*, 492 U.S. at 280 n.26; *see also Gasperini*, 518 U.S. at 438 (explaining that appellate deference is owed district court excessiveness determinations because "[w]ithin the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility" for review of damage awards); *id.* at 426 ("the federal system's division of trial and appellate court functions" is "an allocation weighted by the Seventh Amendment"). Those considerations apply with equal force to constitutional excessiveness determinations, and consequently dictate a deferential standard of appellate review in that context as well. The inconsistency between the Third Circuit's decision below and this Court's decisions in *Browning-Ferris* and *Gasperini* provide an additional basis for review.

C. The Conflicting Standards Of Review Threaten To Increase Arbitrary Punitive Damages Awards

The division among the courts of appeals merits the prompt attention of this Court. If constitutional excessiveness challenges should be reviewed *de novo* (as the Third and Eighth Circuits hold), then defendants assessed punitive damages in the Second, Ninth, and Eleventh Circuits risk being deprived of their property without due process. For in those three circuits, the federal courts of appeals are failing to provide the "intensive review" purportedly required by "the Supreme Court's jurisprudence" to prevent arbitrary punitive damages awards. App., *infra*, 44a.

If review should be deferential, however (as the Second, Ninth, and Eleventh Circuits hold), then the Third and Eighth Circuits have exceeded their constitutional authority and are reducing awards based on judicial fiat. That raw exercise of power would be troubling enough if it were doctrinally cabined. But the *Gore* guideposts are few and flexible. As a result, *de novo* review in principle amounts to arbitrary decisionmaking in fact.

Such arbitrary decisionmaking perversely threatens to turn federal due-process scrutiny from a means of reducing arbitrary punitive damages awards into a source of new disparities. As the *TXO* plurality observed (509 U.S. at 457), punitive awards "are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it." Appellate courts reviewing such assessments have no opportunity to hear the witnesses or take in the exhibits as they were explained at trial. Instead, they see only disjointed excerpts from "the 'cold paper record.'" *Gasperini*, 518 U.S. at 438 (internal citations omitted). By vesting appellate courts with the constitutional responsibility to make punitive damages assessments for themselves, *de novo* review risks increasing the incidence of arbitrary awards. As one commentator wrote of the Third Circuit's decision below: the majority below "appeared to exercise what amounts to de novo review over the amount of the punitive award"; its decision sounds "like the proceedings of the Delphic oracle." *Punitive Gatekeepers*, 158 N.J.L.J. 26 (Oct. 4, 1999).[10]

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[10] *De novo* review is also pernicious for at least three other reasons, which can be explored if this Court grants review. *First*, thirteenth-juror review disrepects the federal jury system and violates the Seventh Amendment for the reasons this Court gave in

Accordingly, this Court should grant review to resolve the conflict among the federal circuit courts and determine the standard for appellate review of challenges to punitive damages awards under *Gore*.

II. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER A PUNITIVE DAMAGES AWARD THAT BEARS A ONE-TO-ONE RATIO TO THE COMPENSATORY DAMAGES AWARD AND REQUIRES RESPONDENTS TO DISGORGE NO MORE THAN THE PROFITS OBTAINED FROM THEIR UNLAWFUL CONDUCT CAN BE UNCONSTITUTIONALLY EXCESSIVE UNDER *GORE*

The Third Circuit's 98% reduction of the remitted punitive damages award—which bore only a one-to-one ratio to the compensatory damages award and merely required EBI to disgorge the profits obtained from its unlawful conduct—exemplifies the increasingly arbitrary character of high and low-ratio punitive damages awards after *Gore*, conflicts in principle with the decisions of other federal and state courts, and undercuts an essential deterrent to malicious conduct.

Browning-Ferris and *Gasperini*. *See supra* pp. 17-18. *Second, de novo* review thwarts the objectives of state tort law (systemic reductions in punitive damages awards dilute the deterrent to malicious violations of state tort law) and removes states' incentive to reform tort law (state legislators will have less incentive to take tort reform bills out of "the hopper" (*Gore*, 517 U.S. at 614 (Ginsburg, J., dissenting)) if federal appellate courts exercise "intensive review" of punitive damages awards rendered in federal court (App., *infra*, 44a)). And *third, de novo* review encourages wasteful appeals of punitive damages awards by defendants in search of a second opinion from the federal appellate court, forcing burdened federal appellate courts to duplicate the work of trial judges and diverting scarce federal judicial resources from more urgent matters.

A. The Third Circuit's Reduction Of A Punitive Damages Award That Bore Only A One-To-One Ratio To The Compensatory Damages Award Exemplifies The Increasingly Arbitrary Character Of High And Low-Ratio Punitive Damages Awards After *Gore*

In an important statistical study of punitive damages awards completed earlier this year, Professors Theodore Eisenberg and Martin Wells found an increase in high and low-ratio punitive damages awards after *Gore*. *See The Predictability of Punitive Damages Awards in Published Opinions, the Impact of* BMW v. Gore *on Punitive Damages Awards, and Forecasting which Punitive Damages Awards Will Be Reduced*, 7 SUP. CT. ECON. REV. 59, 78 (1999) [hereinafter Eisenberg & Wells]. The frequency of punitive damages awards that bear *either* a low ratio *or* a high ratio to the amount of compensatory damages thus appears to be higher after *Gore* than before.[11] Although Professors Eisenberg and Wells cannot assign *Gore* as the cause of awards bearing an extreme ratio of punitive to compensatory damages (*id.* at 78), such outliers plainly persist notwithstanding this Court's decision in *Gore*.

The Third Circuit's decision—which reduced by an astounding 98% a punitive damages award that bore only a one-to-one ratio to the compensatory damages award—is one of a growing number of decisions in which courts have found unconstitutional punitive damages awards bearing low ratios to compensatory damages awards based

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11 Professors Eisenberg and Wells summarized their statistical findings as follows (Eisenberg & Wells, *supra* p. 21, at 78):

> Although the low ratio awards are more dominant after *BMW*, the high ratio awards have, if anything, also increased. The overall effect is a flatter distribution with a smaller middle and a shift toward both low and high extremes.

simply on courts' *ad hoc* determinations that the amount awarded was "too high." [12]

It is inconceivable that a punitive damages award bearing a one-to-one ratio to the compensatory damages award could "enter the zone of arbitrariness that violates the

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[12] *See, e.g., Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581 (5th Cir. 1998) (5.26:1 ratio reduced to 3.94:1 where compensatory damages were $19,000); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir. 1996) (holding excessive a punitive award that was approximately 6.5 times the roughly $20,000 compensatory award); *Lawyer v. 84 Lumber Co.*, 991 F. Supp. 973, 976-77 (N.D. Ill. 1997) (5:1 ratio reduced to 3:1 where compensatory damages were $50,000); *Geuss v. Pfizer, Inc.*, 971 F. Supp. 164, 178-79 (E.D. Pa. 1996) (reducing $150,000 punitive award to $17,500 where compensatory damages were $165,250); *Iannone v. Frederic R. Harris, Inc.*, 941 F. Supp. 403, 415 (S.D.N.Y. 1996) (10:1 ratio reduced to 2:1 where compensatory damages were $25,000); *Florez v. Delbovo*, 939 F. Supp. 1341, 1349 (N.D. Ill. 1996) (13:1 ratio reduced to 5:1 where compensatory damages were approximately $45,000); *Utah Foam Products Co. v. Upjohn Co.*, 930 F. Supp. 513, 532 (D. Utah 1996) (17.5:1 ratio reduced to 2:1 where compensatory damages were $313,593), *aff'd*, 154 F.3d 1212 (10th Cir. 1998); *Rush v. Scott Specialty Gases, Inc.*, 930 F. Supp. 194, 200-01 (E.D. Pa. 1996) (10:1 ratio reduced to 1:1 where compensatory damages were approximately $300,000), *rev'd on other grounds*, 113 F.3d 476 (3d Cir. 1997); *Schimizzi v. Illinois Farmers Ins. Co.*, 928 F. Supp. 760, 786-87 (N.D. Ind. 1996) (13:1 ratio reduced to 3:1 where compensatory damages were approximately $45,000); *Chrysler Corp. v. Schiffer*, 736 So. 2d 538 (Ala. 1999) (6.5:1 ratio reduced to 3:1 where compensatory damages were $50,000); *Ford Motor Co. v. Sperau*, 708 So. 2d 111, 120 (Ala. 1997) (3.5:1 ratio reduced to 1.1:1 where compensatory damages were $1.692 million), *cert. denied*, 118 U.S. 1519 (1998); *Talent Tree Personnel Servs., Inc. v. Fleenor*, 703 So. 2d 917, 927 (Ala. 1997) (10:1 ratio reduced by trial court to 6:6.1 and then by appellate court to 5:1 where compensatory damages were $300,000); *Servino v. Medical Ctr. of Delaware, Inc.*, No. 94C-08-077-WQT, 1997 WL 528263 (Del. Super. Ct. Aug. 1, 1997) (10:1 ratio reduced to 2:1 where compensatory damages were $50,000); *Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493, 504 (S.D. 1997) (13.5:1 ratio reduced to approximately 3:1 where compensatory damages were roughly $350,000).

Due Process Clause." *Gore*, 517 U.S. at 568. In *Gore*, this Court observed that double, treble, and quadruple damages remedies have been legislatively sanctioned for hundred of years. *Id.* at 580-81. Moreover, this Court recognized that the touchstone of the due process inquiry is "fair notice . . . of the severity of the penalty that a State may impose." *Id.* at 574. Given the plethora of statutes mandating double and treble damages for a wide variety of business torts (*see id.* at 581 n.33), as well as those setting punitive damages caps at two to three times compensatory damages (*see id.* at 614-18 (Ginsburg, J., dissenting)),[13] a defendant is always on notice that a punitive award bearing a one-to-one ratio to the actual damages could be imposed against it for malicious conduct.[14]

The Third Circuit's twin rationales for reducing the remitted punitive damages award—that EBI's conduct (a) caused purely economic injury and (b) resulted in a large compensatory award (App., *infra*, 39a)—cannot support its holding that an award bearing a one-to-one ratio to the compensatory award is unconstitutional. The first rationale cannot be reconciled with this Court's holding in *Gore* that "[i]nfliction of economic injury, especially when done intentionally through affirmative acts of misconduct . . . can warrant a substantial penalty." 517 U.S. at 576. Nor can it be squared with this Court's affirmance in *TXO* of a $10 million punitive award in an

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[13] *See supra* note 4 (New Jersey Punitive Damages Act caps punitive damages at the greater of five times the compensatory damages or $350,000).

[14] Although *Gore* set forth two other guideposts (517 U.S. at 574-75), their purpose is to determine whether a punitive award that bears a "shocking disparity" (*TXO*, 509 U.S. at 462) to the actual damages award (as was the case in *BMW*) may nevertheless be rational. This Court did not authorize independent judicial scrutiny of the reprehensibility of the defendant's conduct in cases such as this one, where the punitive award bears an extremely low ratio to the compensatory award.

economic injury case involving conduct no more reprehensible than that involved here. 509 U.S. at 462.[15]

The second rationale—that the jury awarded a substantial amount of compensatory damages—likewise provides no reason to reduce the award of punitive damages. As Professors Eisenberg and Wells explain (*supra* p. 21, at 62):

> A punitive award's level ought to, and often does, relate to the harm the defendant caused. The level of harm caused determines to some extent society's view of the egregiousness of the defendant's misbehavior. Because the compensatory award measures the degree of harm, it should correlate with the level of punitive damages, all other things being equal.

The size of the compensatory award does not alter the doubling or trebling of damages awards rendered under the antitrust laws, RICO, and other statutes. By the same token, the amount of the compensatory damages award

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[15] In *TXO*, the reprehensibility evidence showed that the defendant had acted in bad faith by advancing a claim on oil and gas development rights—to which it knew plaintiff had good title—in an effort to renegotiate its royalty arrangement with the plaintiff. The reprehensibility evidence also showed that the defendant had engaged in similarly deceptive actions in other parts of the country. 509 U.S. at 450-51, 462 n.28.

In a similar vein, the evidence here showed "that EBI acted with either 'actual malice' or 'a wanton and willful disregard of persons who forseeably might be harmed,' that EBI's plan 'involved acts of deception and, at least, reckless disregard of the consequences to Orthofix,' and that those acts continued over an extended period of time with full awareness of the harm to Orthofix." App., *infra*, 39a (citations omitted); *see id.* at 58a (Garth, J., dissenting) ("EBI was found to have engaged in a series of continuous and intentional deceptive acts in order to steal a market from Orthofix worth approximately $95 million"); *id.* at 57a ("intentionality, repetitive conduct, and conduct involving deliberate false statements, etc., were all found by the jury to have occurred in this case"); *id.* at 52a (spelling out in detail the jury's special verdict findings regarding "the egregious, intentional and deceitful behavior by EBI").

cannot render a similarly sized punitive damages award unconstitutionally excessive.

B. The Third Circuit's Reduction Of A Punitive Damages Award That Merely Required EBI To Disgorge Its Ill-Gotten Gains Conflicts In Principle With The Decisions Of This Court And Other Federal And State Courts And Undercuts An Essential Deterrent To Malicious Conduct

The lower courts are confused about how *Gore*'s ratio guidepost accounts (if at all) for the defendant's unjust enrichment. Three Justices in *Gore* wrote that "requir[ing] 'punitive damages' to 'remove the profit' of the illegal activity and 'be in excess of the profit, so that the defendant recognizes a loss' . . . has the ability to limit awards to a fixed, rational amount." *Gore*, 517 U.S. at 591 (Breyer, J., joined by O'Connor and Souter, JJ., concurring). The majority opinion in *Gore*, however, did not refer to the disgorgement of profits obtained from the defendant's unlawful conduct. Instead, it calculated the ratio of punitive damages to the actual or potential harm *to the plaintiff*. *See Gore*, 517 U.S. at 580 ("The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted *on the plaintiff*." (emphasis added)).

The decision below illustrates the confusion over the constitutional relevance of unjust enrichment. The district court conditionally remitted the punitive damages award to $50 million because (among other reasons) the combined award of $98 million removed the profit EBI had obtained by "securing for [itself] the market in bone fixators which had previously been Orthofix's." App., *infra*, 101a. The Third Circuit majority, however, did not mention the $98 million by which EBI had profited from its unlawful conduct. It rested its "decision . . . to reduce the punitive damages award even further . . . upon

the guideposts established by the Supreme Court," and the defendants' unjust enrichment was not one of three guideposts set forth in *Gore*. App., *infra*, 44a.

The Third Circuit's decision below conflicts in principle with this Court's pre-*Gore* decisions in *TXO* (which upheld a $10 million punitive damages award based on "the tremendous financial gains that TXO hoped to achieve" and the "lucrative stream of royalties" that TXO hoped to win, 509 U.S. at 461-62) and *Haslip* (which approved consideration of "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss," 499 U.S. at 22). The Third Circuit's decision also conflicts with decisions of other federal courts and state supreme courts.[16]

Absent review by this Court, the Third Circuit's decision effectively invalidates the unjust enrichment element of New Jersey's Punitive Damages Act (App., *infra*, 92a

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16 *See Sanders v. Gardner*, 7 F. Supp. 2d 151, 177 (E.D.N.Y. 1998) (upholding arbitrators' award of $10 million in punitive damages where compensatory award was $184,000 and stating that "[a]lthough the ten million dollars presents an imposing figure standing alone, relative to the ill-gotten gains of . . . Petitioners, it seems utterly reasonable."); *Guzman v. Tower Development, Inc.*, No. CV96-00005A, 1996 WL 875780, at *2-*3 & n.3 (D. Guam Oct. 4, 1996) (affirming punitive damages award of $4 million on compensatory award of $232,734.17 (a ratio of over 17:1) and citing *Haslip* for the proposition that it is desirable for punitive damages award to remove the profitability of the wrongful act and to have the defendant sustain a loss); *American Pioneer Life Ins. Co. v. Williamson*, 704 So. 2d 1361, 1366 (Ala. 1997) (offering plaintiff a remittitur and stating that "[a]ny punitive damages award should remove any profit earned by APL as a result of its misconduct."); *Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 598 (1997) (explaining that West Virginia trial courts should advise juries of a number of factors in their consideration of punitive damages, including: "If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.").

n.8) and the tort reforms of many other states (*e.g.*, *Haslip*, 499 U.S. at 22). It also undercuts an essential deterrent to malicious conduct. Deterrence requires that punitive damages be imposed in an amount that removes all of the actual or anticipated gain by a defendant. There is no need to worry about "chilling" economically efficient behavior, given that intentional torts that seek to bypass the system of market exchange "have no social value at any level: their optimal level is zero. To eradicate such activities, efficient law would . . . reduce to zero the expected gain available to the defendant from the injurious activity, leaving no incentive for him to attempt the activity in the first place." David D. Haddock, Fred S. McChesney & Menahen Spiegel, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1, 13 (1990). Because an award of punitive damages requiring a defendant to disgorge the profits it made as a result of its unlawful conduct rationally advances the state's interest in deterrence, it cannot effect an arbitrary deprivation of property in violation of the Due Process Clause.

This Court's review is needed to help settle the confusion in the lower courts over *Gore*'s ratio guidepost and the role that the profitability of the defendant's unlawful conduct has in its application.

III. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER FEDERAL COURTS HAVE THE POWER TO REDUCE A PUNITIVE DAMAGES AWARD TO A SPECIFIED LOWER AMOUNT OR MUST INSTEAD OFFER THE PLAINTIFF A NEW TRIAL

Unlike the district court, which conditionally remitted the punitive damages award (App., *infra*, 106a), the Third Circuit ordered the entry of "a judgment for punitive damages in the amount of $1 million" (*id.* at 45a).

The Third Circuit's outright reduction of the remitted punitive damages award conflicts with decisions of the Second and Tenth Circuits, which conditionally remit punitive damages awards to "avoid any conflict with the Seventh Amendment." *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 643 (10th Cir. 1996) (internal quotation omitted); *see Lee v. Edwards*, 101 F.3d 805, 813 (2d Cir. 1996). The Eleventh Circuit disagrees with the Second and Tenth Circuits and is in accord with the Third Circuit. *See Johansen*, 170 F.3d at 1331-32 (noting conflict with the Second and Tenth Circuits, but holding that the Seventh Amendment does not require giving the plaintiff the option of a new trial).

The Third Circuit's reduction is also in tension with this Court's decision in *Hetzel v. Prince William County*, 523 U.S. 208, 118 S. Ct. 1210 (1998) (per curiam). In *Hetzel*, this Court held that a court of appeals' reduction of an excessive *compensatory* damages award, "without allowing petitioner the option of a new trial, cannot be squared with the Seventh Amendment." *Id.* at —, 118 S. Ct. at 1212. So, too, here, the court of appeals' reduction of an ostensibly excessive punitive damages award, without offering Orthofix the option of a new trial, "cannot be squared with the Seventh Amendment."

Whether federal courts have power to reduce punitive damages awards under *Gore*—without offering the option of a new trial—has become an important question after *Gore* in light of the increasing number of constitutional excessiveness challenges. This Court's review is necessary to resolve the conflict among the lower courts regarding whether this Court's reasoning in *Hetzel* applies to review of punitive damages awards.

* * * * *

Three years have passed since this Court first held that a punitive damages award violated substantive due process.

In the wake of the Court's decision in *Gore*, the federal circuit and state supreme courts have struggled—and divided—over the standard of review, the application of the ratio guidepost, and the constitutionally permissible remedy for unconstitutionally excessive awards. This case offers this Court the opportunity to resolve those urgent questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 21, 1999

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APPENDICES

APPENDICES

APPENDIX A

Filed June 28, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-5158

INTER MEDICAL SUPPLIES, LTD.

v.

EBI MEDICAL SYSTEMS, INC.;
ELECTRO-BIOLOGY, INC.;
BIOMET, INC.

v.

ORTHOFIX, LTD.
ORTHOFIX INTERNATIONAL, N.V.

(D.C. Civil No. 95-06035)

ORTHOFIX, INC.;
ORTHOFIX S.R.L.

v.

EBI MEDICAL SYSTEMS, INC.;
ELECTRO-BIOLOGY, INC.;
BIOMET, INC.

(D.C. Civil No. 96-01047)

EBI MEDICAL SYSTEMS, INC.;
ELECTRO-BIOLOGY, INC.;
BIOMET, INC.,
Appellants

On Appeal from the United States District Court
for the District of New Jersey

(D.C. Civil No. 95-cv-06035)

District Court Judge: Stephen M. Orlofsky

Argued October 29, 1998

Before: SLOVITER, GARTH, and MAGILL,*
Circuit Judges

(Filed June 28, 1999)

OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

Following a lengthy trial, a jury found for plaintiff companies on all of the breach of contract and tort claims submitted to it and it returned a verdict of $48 million in compensatory damages and more than $100 million in punitive damages. The District Court denied the defendants' motions for judgment as a matter of law or for a new trial but granted a remittitur reducing the award of punitive damages to $50 million. *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 975 F. Supp. 681, 685

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* The Honorable Frank J. Magill, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

(D.N.J. 1997). On appeal, defendants focus on certain of the bases for recovery, but, understandably, direct their most vigorous critique to the sizable damages awards, primarily that for punitive damages. The role of gatekeeper over such punitive damages verdicts is one of the most challenging that has been placed upon appellate judges in civil cases.

I. FACTS

A. Background

Orthofix S.r.l., an Italian company, manufactures medical devices, including a product known as an external bone fixator, which is used to hold severely fractured bones in alignment, thereby obviating the need for repeated surgery. It is wholly owned by Orthofix, N.V. of the Netherlands, which itself owns Inter Medical Supplies, Ltd., a Cyprus-based company that is the worldwide distributor of the Orthofix bone fixators. These entities will be referred to collectively as "Orthofix."

Biomet, Inc., an Indiana company, manufactures orthopedic devices and owns Electro-Biology, Inc. Electro-Biology in turn owns EBI Medical Systems, Inc., a New Jersey-based corporation that sells external bone fixators. These entities will be referred to collectively as "EBI."

Beginning in 1983, EBI and Orthofix entered into a series of distributor agreements pursuant to which EBI served as the exclusive distributor in the United States, Canada, and the Caribbean Basin for various orthopedic devices, principally external bone fixators, manufactured by Orthofix. The last of these agreements went into effect on June 1, 1990, and expired on May 31, 1995 (the "Distributor Agreement"). For some eleven years, EBI and Orthofix shared what each agrees was a profitable business relationship, grossing approximately $30

million in sales annually and controlling one-third of the United States bone fixators market.

The present dispute arises out of the 1990 Distributor Agreement between the parties. Under paragraph 8 of the Agreement, Orthofix agreed to promptly supply EBI with "such quantities of the products as [were] ordered from time to time." In turn, EBI agreed under paragraph 6(k) to "maintain in its inventory, at all times, a quantity of Products reasonably necessary to meet [EBI's] resale requirements for at least two months." In paragraphs 6(f) and (g), EBI agreed to distribute and sell Orthofix's products in conjunction with the Orthofix trade name, but promised not to appropriate that name as part of its own corporate designation. Both parties agreed not to disclose proprietary information obtained from the other.

Finally, EBI consented to restrictions on its ability to deal in competitive products. Specifically, in paragraph 6(d) EBI undertook

> not to distribute, sell, promote the sale of, or in any way handle during the term of this Agreement and for one (1) year after its early termination by EBI any product which could reasonably be deemed competitive with the [Orthofix] Products.

Despite the excellent results from their mutual efforts, the business relationship between EBI and Orthofix deteriorated during the last year of the June 1990 Distributor Agreement. When EBI and Orthofix representatives met in June 1994 to negotiate a renewal, the relationship collapsed due to a dispute over the division of sales revenues. In anticipation of the termination of the Agreement, each party took steps in an effort to protect its own long-term business interests. Orthofix sought and located a

new distributor, and on May 8, 1995, it announced that it had acquired American Medical Electronics, which became Orthofix, Inc. Upon the expiration of the Agreement with EBI in June 1995, Orthofix, Inc. became the exclusive United States distributor of the Orthofix fixator.

For its part, EBI responded to the impending severance of its relationship with Orthofix by beginning development of its own external fixator, "Dynafix," with sales of that fixator to begin after expiration of the Distribution Agreement. It is EBI's conduct in anticipation of and after termination that led to this litigation.

B. Litigation

1. *Complaint, Answer, Counterclaim*

In November 1995, Inter Medical Supplies sued EBI in the United States District Court for the District of New Jersey for failure to pay for several shipments of products sold during that year. At approximately the same time, Orthofix, Inc. and Orthofix S.r.l. also filed suit against EBI in the United States District Court for the Northern District of Texas, alleging breach of contract of the 1990 Distributor Agreement; misappropriation of trade secrets; patent infringement, 35 U.S.C. § 271; violations of the Lanham Act, 15 U.S.C. §§ 1114, 1125(a); unfair competition under Texas law, Tex. Bus. & Com. Code Ann. § 16.29; fraud under the New Jersey Consumer Fraud Act, N.J. Stat.. Ann. § 56:8-2; common law unfair competition; intentional interference with prospective contractual relations; defamation and trade libel; and injurious falsehood and product disparagement.

On EBI's motion, the Texas case was transferred to the New Jersey District Court. EBI then answered and counterclaimed for breach of contract, tortious interference

with both the 1990 Distributor Agreement and EBI's other customer and business relationships, fraud, defamation, violation of the Lanham Act, breach of the distribution franchise on New Jersey statutory and common law grounds, and other breaches and torts arising from the parties' contractual relationship.

The parties proceeded with discovery and pretrial. In one significant *in limine* ruling on a key clause in paragraph 6(d) of the Distributor Agreement, the District Court ruled that the language of the clause prohibited EBI from developing during the term of the agreement any product competitive to those it was distributing for Orthofix. *See Orthofix, Inc. v. EBI Med. Sys. Inc.*, Civ. Action No. 95-6035 (SMO), at 14 (D.N.J. Apr. 8, 1997) (hereafter *In Limine* Ruling).

2. *Trial*

The jury trial began on April 7, 1997, and lasted two months. At its conclusion, the jury responded to special verdict questions by finding in favor of Orthofix on its claims for breach of contract, breach of the duty of good faith and fair dealing, tortious interference with prospective economic advantage, tortious interference with contract, defamation, unfair competition, and violation of the Lanham Act. EBI does not contend on appeal that the evidence was insufficient for the jury to find it liable for breach of contract. In fact, the District Court found, and we agree, that the jury could have concluded that EBI's plan involved the development and production of its own external bone fixator to compete directly with Orthofix following the end of the distributorship. *Inter Med. Supplies*, 975 F. Supp. at 685. Other evidence supported the conclusion that EBI's strategy was to convert present Orthofix purchasers to the new EBI fixator and

to drive Orthofix from the North American market. EBI started the process of bringing its own fixators to market in July 1994, although it did not formally place its product on the market until August 1995.

In addition to developing its new, competitive product, EBI ordered vast quantities of the Orthofix products and parts it was then distributing. From October 1994 to May 1995, EBI began ordering Orthofix product in amounts far in excess of its two-month inventory needs. It eventually stockpiled inventory sufficient to meet its needs for sixteen months. There was evidence that to achieve this result, EBI hid its stockpiling of Orthofix products by ordering and paying for products through third parties. For nearly one year EBI also failed to provide Orthofix with a series of required quarterly reports of its sales and inventory levels, further preventing Orthofix from promptly learning of EBI's excessive ordering.

Once the final Distributor Agreement terminated at the end of May 1995, EBI began to take advantage of the market it had earlier created for Orthofix products. There was evidence that in order to continue to have such Orthofix products available to it, EBI acquired Orthofix product components through third parties. Its employees used reverse engineering to analyze the construction of these Orthofix components and then substituted EBI-manufactured parts for genuine Orthofix ones. EBI never informed medical professionals of the substitution, in effect passing off EBI's own components for those of Orthofix.

When the new EBI bone fixators ultimately appeared on the market, EBI promoted them through practices the jury could have found deceptive. The sales force inaccurately described the fixators to purchasers as upgrades to or newer versions of the Orthofix products that EBI had

been selling for years. At the suggestion of EBI's president, James Pastena, salespersons falsely stated that EBI elected to terminate the distributorship because the Orthofix product line was inadequate for the needs of the medical profession.

On the basis of this and like evidence, the jury found that EBI had both breached its contract with Orthofix and committed various torts. The jury awarded the Orthofix companies $48 million in compensatory damages. The verdict sheet, however, did not specify what portion, if any, of the $48 million compensatory damages award was meant to compensate the tort injuries and what portion, if any, was meant to remedy the contractual breaches. The jury also awarded $100,600,000 in punitive damages, which contained no breakdown by defendant or count. In a separate determination, the jury awarded Inter Medical Supplies $875,399 to compensate for EBI's failure to pay for products delivered at EBI's request.

In response to EBI's counterclaims, the jury concluded that Orthofix had engaged in tortious conduct and breached the Distributor Agreement. It awarded one dollar in damages on the contract breaches and tortious acts, as well as granted a one-dollar set-off for Inter Medical Supplies' breaches in filling and shipping EBI's orders.

3. *Post-Trial Motions*

After the verdict, EBI moved for judgment as a matter of law or for a new trial pursuant to Federal Rule of Civil Procedure 50. It also requested that the District Court grant a remittitur on the punitive damages assessment. EBI broadly attacked the trial and verdict, asserting that there was insufficient evidence to support a finding of liability under either a tort or a breach of contract

theory, or to support the damages calculation. EBI claimed that the court failed to assure that the jury distinguished between tort and breach of contract damages. Finally, EBI alleged that the court failed to adequately respond to references Orthofix made in its closing to EBI's alleged violations of the Food, Drug, and Cosmetic Act ("FDCA").

The District Court rejected EBI's legal arguments on all issues except the punitive damages remittitur. *See Inter Med. Supplies,* 975 F. Supp. at 702-03. Deferring in great part to the jury, the court concluded that the evidence was sufficient to support both the jury's findings of tortious conduct and breach of contract and its calculation of compensatory damages. *See id.* at 686-88. In response to EBI's claim that Orthofix's allegations of FDCA violations prejudiced the jury, the court noted that it had submitted to the jury EBI's own proposed instruction for curing that error. *See id.* at 690-91.

EBI also argued that because the jury failed to apportion the compensatory damages between the tort and breach of contract claims, instead awarding all such damages in a single sum, the punitive damages award could not be sustained because it could be applied only for tortious conduct, which had not been been separately assessed. The District Court rejected that argument, observing it had instructed the jury on that issue and that the jury presumably understood the instructions. Although the New Jersey Punitive Damages Act, N.J. Stat. Ann. §§ 2A:15-5.9 to .17, provides that punitive damages must be apportioned among defendants, EBI had not objected to the jury's failure to allocate, and the District Court found a waiver. *See id.* at 696-98. The court concluded that the jury could have found that EBI's tortious conduct

was malicious and "accompanied by a willful disregard of the plaintiffs' rights," *id.* at 694, warranting punitive damages. Additionally, the court noted that the amount of punitive damages awarded fell within the range permitted by the Constitution and the New Jersey Act.

However, the District Court exercised its authority to review the award for reasonableness under New Jersey law and reduced the amount of punitive damages to $50 million under the New Jersey Act. *See Inter Med. Supplies,* 975 F. Supp. at 698-702. The court concluded that the jury could not have found that the conduct between these private parties was likely to recur, *see id.* at 700; that cases involving purely economic harm and the enforcement of private rights, such as this one, warrant different treatment than do suits involving a "serious threat to public health," such as products liability suits, in which a defendant has placed a defective product into commerce and into the hands of unsuspecting consumers, *id.* at 700-01; and that the amount the jury awarded was unreasonable given the other factors in the case, *see id.* at 701-02.

The District Court issued its opinion and order on August 28, 1997, and an amended judgment on September 2, 1997. On September 26, 1997, EBI filed a notice of appeal with the United States Court of Appeals for the Federal Circuit, presumably because, at one point, Orthofix's complaint included a patent infringement count. On Orthofix's motion, the Federal Circuit transferred the appeal to this court pursuant to 28 U..S.C. § 1631, because Orthofix had abandoned the patent claim early in the litigation. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

II. DISCUSSION

EBI raises five claims on this appeal. Three of them are directed to the District Court's interpretation of the language of the Agreement and the effect of EBI's conduct; the latter two are directed to the damages awards. As to the Agreement, EBI claims that the District Court erred when it interpreted EBI's promise under paragraph 6(d) of the Distributor Agreement not to "in any way handle" competing products as prohibiting EBI from developing a competing bone fixator product while the agreement was in existence. EBI next asserts that the District Court erred in interpreting the Agreement as including duties of good faith and fair dealing as they pertain to EBI's orders for fixator products. It also contends that the District Court erred in concluding that EBI's over-ordering of products constituted tortious interference with Orthofix's prospective economic advantage. As to damages, EBI argues that the jury's award of $48 million was speculative and lacked substantial evidence. Finally, EBI vigorously argues that the punitive damages award, even as reduced, was the product of prejudice, violated New Jersey law, and was excessive and unreasonable. We review these contentions seriatim.

A. Interpretation of Paragraph 6(d)

In paragraph 6(d) EBI undertook "not to distribute, sell, promote the sale of, or *in any way handle* . . . any product which could reasonably be deemed competitive" with Orthofix's products. Before trial, EBI moved for an *in limine* ruling to preclude Orthofix's introduction of extrinsic evidence on the meaning of this paragraph. After a hearing and thorough consideration of the parties' arguments and submissions, the District Court denied the motion, holding that the handling clause unambiguously pro-

hibited development of a competitive product during the term of the Agreement. We must consider at the outset whether EBI preserved this issue for appeal.

Orthofix argues that EBI waived any objections that it might have had to either the District Court's *in limine* ruling or the court's subsequent jury instruction because EBI did not object to the District Court's construction of the "handle" clause at any time after resolution of the motion *in limine*. The issue was not raised during the course of formulating or giving jury instructions. And, EBI's own proposed instruction largely incorporated the construction to which it now objects, stating:

> [T]he phrase "in any way handle" in Paragraph 6(d) of the Distributor Agreement includes "a prohibition on the development of a competitive product in the marketplace."

App. at 1477. Indeed, this was substantially the instruction given by the District Court without objection from EBI. Our recent precedents provide some guidance on this issue.

In *American Home Assurance Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321 (3d Cir. 1985), we considered whether a formal exception to the admission of evidence would be necessary to preserve that issue for appeal, if the court had already issued a definitive *in limine* ruling. There, the insurer, American Home, sought an *in limine* ruling to prevent the admission of evidence that it never prosecuted the arson on which it based its refusal to pay the policyholder. The court refused to give the ruling that American Home requested, reasoning that the evidence was admissible. *See id.* at 324. After it lost at trial, American Home appealed, citing as error the admission of such evidence. The insured asserted that

American Home had waived the claim when it failed to raise an objection at trial. We rejected that argument, explaining that the reason we require parties to raise objections or waive them is to assure that the court's attention is drawn to potential errors before it is too late to remedy them. *See, e.g., Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 276 (3d Cir. 1998). We further held that this rationale is no longer applicable once a court has not only learned of the alleged error, but issued a definitive ruling that it is unlikely to reconsider in the future. *American Home Assurance*, 753 F.2d at 324. We concluded that "requiring an objection when the evidence was introduced at trial would have been in the nature of a formal exception and, thus, unnecessary under [Federal Rule of Civil Procedure] 46." *Id.* at 325.

In our recent decision in *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506 (3d Cir. 1997), we relied on *American Home Assurance*, articulating the applicable principle as providing that a party can preserve an evidentiary issue for appeal by, first, providing the court with a written motion including reasons and case authority, and second, obtaining a definitive ruling that does not suggest the matter will be reconsidered later at trial. *Id.* at 518. *But see Simmons v. City of Philadelphia*, 947 F.2d 1042, 1082-83 (3d Cir. 1991) (Becker, J., announcing judgment of court) (discussing concerns raised where party's continued adherence to objection is unclear).

The reasoning of *American Home Assurance* and *Walden* is persuasive here. Once EBI obtained a definitive ruling after full briefing on the disputed contract provision, there was little purpose in repeatedly raising the issue at trial because there was little likelihood that the court would revisit its decision. Nevertheless, Orthofix

argues that we must review the jury instruction only for plain error because the District Court adopted, with only slight revision, the charge that EBI itself proffered. It may be that the same reasoning that supported our conclusion in *American Home Assurance* and *Walden* that no objection was required when the evidence at issue was proffered also supports holding that EBI did not waive its objection by submission of its proposed charge.

One could reasonably argue that the purpose underlying Federal Rule of Civil Procedure 51, which governs objections to jury instructions, would not be advanced by requiring a party to submit an instruction that contradicts a definitive *in limine* ruling or to object to a proposed instruction that incorporates that ruling. *Cf. Smith*, 147 F.3d at 277. Under that theory, the initial definitive ruling decides the question for the case and satisfies the requirement of Rule 51 that the record contain "the matter objected to and the grounds of the objection." A litigant's attempt to revisit that ruling at the time of the jury instructions would use the court's time and resources inefficiently.

We need not decide that issue here. Although in many cases the difference between plenary review and plain error review would be dispositive, in this case it is not, as the conclusion we reach using plenary review, which ordinarily applies when we review the District Court's interpretation of the contract, *see Williams v. Metzler*, 132 F.3d 937, 946 (3d Cir. 1997), would necessarily be the same were we to apply the more restrictive plain error review.

We now turn to consider EBI's objection to the District Court's *in limine* ruling. The gist of the dispute between the parties is whether to define the word "handle" broadly

or narrowly, particularly in light of the prefatory phrase "in any way." Both parties contended in connection with the *in limine* ruling that the "in any way handle" clause was unambiguous, although they disagreed on its meaning. Here, EBI renews its argument that the clause is unambiguous. It then proceeds, relying on United States principles of contract interpretation, such as *ejusdem generis*, to argue that the language should be interpreted narrowly. Under the interpretation EBI proffers, the clause precluded it from distributing, selling, or marketing competing products, but not from developing such products.

It finds support for this definition from *Webster's Third New International Dictionary* 1027 (1961) (defining "handle" as, *inter alia*, "to trade in: engage in the buying, selling, or distributing of") and from *Random House Dictionary of the English Language* 866 (2d ed. 1987) (defining "handle" as, *inter alia*, "to deal or trade in").

Orthofix responds that the meaning of the "handle" clause is broad enough to include more than selling, distributing, and promoting, which activities already are listed in the contract, and that it also encompasses prohibition of any development by EBI of competing products. It notes that the dictionary also includes the following listings for handle: "2(b): to conduct oneself in relation to, assume an attitude"; "2(c)(1): manage, control, direct"; and "2(e): deal with, act upon, dispose of, perform some function with regard to." *Webster's Third New International Dictionary* 1027; *see also Random House Dictionary of the English Language* 866 (listing "11. to manage, deal with, or be responsible for" and "13. to manage, direct, train, or control"). Additionally, Orthofix denies that *ejusdem generis* has any application in this context.

We observe that paragraph 15 of the Distributor Agreement provides: "This agreement shall be governed by the laws of the Republic of Italy." The parties introduced affidavits from experts in Italian law at the *in limine* hearing. According to the District court these experts effectively agreed that "because the Distributor Agreement was drafted in English, the terms of that agreement should be given their natural meaning in English." *In Limine* Ruling at 8.

The District Court relied heavily on the dictionary definition of "handle," from which it construed the word to prohibit development of a product during the lifetime of the agreement. It explained that it construed the word expansively because of the prefatory words "in any way." *See In Limine* Ruling at 9. Additionally, the District Court was "not convinced that ejusdem generis is a canon of construction known to Italian law." *In Limine* Ruling at 10. Neither party has directed our attention to case law that supports its expert's position, and apparently neither party provided the District Court with any such authority.

Thus, there is no support for the contention that Italian law would permit courts of the United States to apply United States interpretive rules to a contract invoking Italian law. Even if it were appropriate to use such rules, we agree with the District Court that they could not be applied to restrict the meaning of the term "handle" because that term is immediately preceded by the phrase "in any way." Therefore, we conclude that the District Court did not err when it approached the question as one of plain meaning and relied on the ordinary dictionary definition of the words "in any way handle."

We agree with the District Court that the inclusion of the phrase "in any way" suggests a broad interpretation

of the term "handle" and supports the reading that Orthofix urges us to adopt. We thus conclude that the Agreement prohibited EBI from researching and developing a competing product during the tenure of that contract

As an alternative, EBI argues that if the clause is ambiguous, the District Court should have left the issue for the jury rather than relying on extrinsic evidence. But even if we were to engage in an inquiry whether the contract's language is ambiguous, we are satisfied that the District Court did not err in its analysis under that approach. "[A] contract is unambiguous if it is reasonably capable of only one construction." *Tamarind Resort Assocs. v. Government of the Virgin Islands*, 138 F.3d 107, 110-11 (3d Cir. 1998). Our case law sets forth the steps to be taken in establishing whether or not contract language is ambiguous. "To decide whether a contract is ambiguous, we do not simply determine whether, from our point of view, the language is clear. . . . Before making a finding concerning the existence or absence of ambiguity, we consider the contract language, the meanings suggested by counsel, and the extrinsic evidence offered in support of each interpretation." *Teamsters Indus. Employees Welfare Fund v. Rolls-Royce Motor Cars, Inc.*, 989 F.2d 132, 135 (3d Cir. 1993).

Review of the District Court's disposition of EBI's motion *in limine* establishes that the court followed the required steps in identifying ambiguity. The court considered the handling clause language, the dictionary definition of the phrase "to handle," and the context of the phrase. It analyzed and discussed the alternative meanings assigned to the phrase by counsel and explained that, in context, only one of these interpretations was reasonable. Finally, the court found that its construction of the

handling clause was supported by extrinsic evidence regarding what Orthofix intended in insisting that the handling clause remain in the agreement.

EBI argues that the District Court exceeded its authority in considering extrinsic evidence in support of Orthofix's interpretation of the contract. That extrinsic evidence included an internal memorandum dated June 6, 1990, from Robert Gaines-Cooper, group chairman of Orthofix, to Orthofix counsel Daniel Gilioli, which memoralized certain aspects of the negotiation of the Distributor Agreement then under way between Orthofix and EBI. In the memorandum, Gaines-Cooper wrote that he had rejected EBI's request to remove the phrase "in any way handle" from the Distributor Agreement so that EBI could develop a competing product during the final year of the Agreement. The court also considered a draft of the Distributor Agreement obtained from EBI files in which the words "in any way handle" were crossed out.

Finally, the District Court held a hearing pursuant to Federal Rule of Evidence 104 at which Gaines-Cooper testified that it was his understanding that EBI wanted to develop a competing product and that he refused to remove the phrase "in any way handle" from the Distributor Agreement in order to prevent such development. Thereafter, the District Court engaged counsel in a lengthy discussion about the reliability of Orthofix's evidence, and concluded that there was "no extrinsic evidence to contradict the testimony of Mr. Gaines-Cooper or to impeach . . . the memorandum to [his counsel]." *In Limine* Ruling at 14. In arguing that this reliance on extrinsic evidence was misplaced, EBI ignores our precedent. "Before making a finding concerning the existence or absence of ambiguity, we consider . . . the extrinsic evidence offered in support of each interpretation." *Teamsters Indus. Em-*

ployees Welfare Fund, 989 F.2d at 135. As we stated there, "Extrinsic evidence may include the structure of the contract, the bargaining history, and the conduct of the parties that reflects their understanding of the contract's meaning." *Id.*

We conclude that the District Court did not err in relying on extrinsic evidence and that, in light of all of the relevant factors cited by the District Court, the handling clause is "reasonably capable of only one construction." *Tamarind Resort Assocs.*, 138 F.3d at 110-11. Thus, the District Court did not err in holding that the contract was not ambiguous and in concluding that the Agreement's "in any way handle" clause prohibited EBI from developing a competing bone fixator product during the term of the agreement. Therefore, it did not err in so instructing the jury.

B. Implied Contractual Duty Not to Over-Order

EBI next takes issue with the decision that it breached the contract by over-ordering Orthofix products. It argues that the District Court erred in concluding that the contract contained an implied duty of good faith and fair dealing not to over-order. EBI further contends that there is insufficient evidence of the damages, if any, the alleged over-ordering caused and concludes that the entire compensatory award must therefore be overturned.[1]

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[1] Orthofix argues that EBI's motion for judgment as a matter of law was limited to the claim that Orthofix could not recover *damages* for alleged excess orders, assuming that those orders did breach EBI's implied duty of good faith, and, consequently, that EBI cannot now appeal on the claim that there was no implied duty. We reject Orthofix's claim, because EBI argued in its motion that it was entitled to order and sell as much Orthofix product as it wanted under the contract, *see* App. at 1386, 1440, an argument that assumes the absence of an implied duty of good faith.

The parties agree that there is no express provision in the Agreement that prohibits EBI from ordering as much as it could purchase. EBI notes that paragraph 8 of the Agreement obligated Orthofix to "promptly supply. . . such quantities . . . as are ordered from time to time," without limiting that obligation in any way, *see* App. at 207, and that paragraph 6(k) required EBI to maintain an inventory level covering at least two months requirements, *see* App. at 206. Thus, EBI concludes, the contract specifically addresses what amount it could order, setting a minimum but no maximum. It then points out that under our decision in *USX Corp. v. Prime Leasing Inc.*, 988 F.2d 433 (3d Cir. 1993), "[t]here can be no implied covenant as to any matter specifically covered by the written contract between the parties." *Id.* at 439 (citation omitted).

We need not decide whether EBI's argument would be persuasive under other circumstances because it is based on principles of United States contract law, whereas, as discussed above, the Agreement, by its terms, must be construed in accordance with Italian law. Therefore, we must attempt to ascertain whether Italian law would infer a duty of good faith and, if so, whether such a duty would include the obligation not to over-order.

We engage in plenary review of a question of foreign law. *See Grupo Protexa, S.A. v. All American Marine Slip*, 20 F.3d 1224, 1239 (3d Cir. 1994). "[E]xpert testimony is the most common way to determine foreign law. . . ." *In the Matter of the Arbitration Between: Trans Chem. Ltd. & China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 275 (S.D. Tex. 1997), *aff'd and op. adopted in relevant part, Trans Chem. Ltd. v. China National Mach. Import & Export Corp.*, 161 F.3d 314, 319 (5th Cir. 1998) (per curiam).

Here, each party relied on the affidavits of its own expert. These experts reviewed the Agreement to determine whether it included an implied duty of good faith. They agreed that, under Italian law, it did. They disagreed, however, as to the content of the implied duty in this context, and hence as to the permissible level of EBI orders under Italian law.

Orthofix's expert, Professor Piero Bernardini, working from the assumption that EBI purchased fixators "in excess of its actual requirements for the purpose of resale after the expiration of the Agreement," App. at 1334, described such conduct as "manifestly in breach of the good faith duty in the contractual performance." App. at 1343. He concluded that although there was no language referring to a duty not to order excessively, the Agreement did link orders to EBI's "expected requirements." *See* App. at 1343. He found that linkage in paragraph 3 of the Agreement, which provides:

> Firm orders for the products shall be placed with Orthofix within the first fifteen (15) days of a given month for shipment at least two (2) months from the date of the order. With each of said orders EBI shall provide Orthofix with a written forecast of its expected requirements of the product for the three (3) subsequent months commencing from the end of the two (2) months period for which the said shipments are intended. Such forecasts shall not be binding on either party.

App. at 203.

In contrast, EBI's expert, Professor Fabio Emilio Ziccardi, interpreted the Agreement as a requirements contract under Italian civil law, and stated that, because the contract specified a minimum but no maximum

amount of product, EBI was free to order any amount above the minimum, subject only to Orthofix's acceptance of that order. App. at 240-42.

In the face of disagreement between experts on such matters, we may adopt any position that is supported by reasonable inferences either from the respective country's law or "from the implications of a legal concept such as a contract or testament or juristic personality." *Merinos Viesca y Compania, Inc. v. Pan American Petroleum & Trans. Co.*, 83 F.2d 240, 242 (2d Cir. 1936); *cf. Mobile Marine Sales, Ltd. v. M/V Prodromos*, 776 F.2d 85, 89-90 (3d Cir. 1985) (rejecting Panamanian official's certification of due registration in favor of court's own reading of Panamanian law); *In the Matter of Arbitration Between: Trans Chem. Ltd. & China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. at 275 ("[F]ederal judges may reject even the uncontradicted conclusions of an expert witness and reach their own decisions on the basis of independent examination of foreign legal authorities." (citation omitted)).

We conclude that Orthofix's expert's interpretation of the Agreement is more reasonable because it relied on the language in the Agreement, particularly that in paragraph 3 obliging EBI to provide Orthofix with a forecast of its expected requirements for the three months after the two-month order period. EBI's expert, on the other hand, relied more heavily on the absence of language. The contractual obligation that EBI provide Orthofix with a forecast of its need for the three months after its current inventory was likely to be exhausted, although not binding on either party, certainly suggested both that Orthofix expected EBI to keep its inventory fairly current and that there was a relationship between EBI's immediate inventory needs and its orders. There would be no need for

such a provision if the parties intended to allow EBI to accumulate, without notice, inventory for sixteen months. Bernardini's interpretation also more effectively integrates paragraph 3, on which he relied, with three other paragraphs: paragraph 6(e) (requiring EBI to forward to Orthofix, *inter alia*, monthly sales reports and "quarterly reports indicating the quantity of Products comprising EBI's inventory"), App. at 205; paragraph 6(k) (requiring EBI to maintain inventory "reasonably necessary to meet its resale requirements for at least two (2) months"), App. at 206; and paragraph 11.1 (requiring Orthofix to fill any order it accepted before the expiration of the Agreement), App. at 207.

In light of these provisions, we are persuaded that Italian law would not give EBI free reign to order whatever it wanted so long as Orthofix accepted the orders and made some attempt to fill them. Thus, the District Court did not err when it accepted the position of Orthofix's Italian law expert that EBI had an implied duty of good faith and fair dealing not to over-order Orthofix products.

Moreover, even if this were a question of United States contract law, subject to plenary review, *see Williams*, 132 F.3d at 946, we would find against EBI. As noted above, EBI's argument is that there can be no implied duty not to over-order because the contract specifically covers the issue. The principal provision to which it refers is paragraph 8, which covers Orthofix's obligation to fill EBI's orders. Even EBI's own Italian expert rejected that construction, opining that the Distribution Agreement only specifies a minimum, App. at 241, and "clearly has no provision at all concerning the purchases 'in excess,'" Supp. Affidavit § 4.4. In the absence of any provision that "specifically covers" the matter, we reject EBI's con-

tention that United States contract law bars the covenant implied here by the Agreement.

There was evidence to support the jury's finding that EBI over-ordered and stockpiled Orthofix products while actively misleading Orthofix about its need for additional product, thereby breaching the duty of good faith and fair dealing. Examining this evidence in the light most favorable to Orthofix, we conclude that the District Court properly denied EBI's motion for judgment as a matter of law.

EBI nonetheless contends that Orthofix failed to present evidence of the damages it claims to have suffered from EBI's sale of the excess products, and argues that therefore the entire damages award should be reversed. As we have previously observed, even when an entire theory of liability relied on at trial is subsequently held impermissible, the jury's finding of liability on a separate theory in a special verdict can sustain the award of damages. *See Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 806 (3d Cir. 1984); *see also Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 100 (3d Cir. 1993). It follows that even if Orthofix failed to identify the damages caused by the sale of the over-ordered product, that would not negate the jury's liability verdicts on the three other contract breaches and the eight torts. Moreover, the case was not presented as a series of separate breaches of contract and tort, each of which caused separate defined damages. Thus, there is no basis to overturn the entire compensatory damages award.

C. Tortious Interference

In a related claim, EBI contends that the District Court erred in denying its motion for judgment as a matter of law on the jury's verdict that held it liable for the tort of

interference with prospective economic advantage on the basis of its conduct in over-ordering bone fixators. EBI argues that the evidence did not establish that it lacked justification or excuse for its conduct, one of the required elements for the tort,[2] and that "[b]reach of contract, without more, is not a tort." Appellants' Br. at 33 (quoting *Windsor Sec., Inc. v. Hartford Life Ins. Co.*, 986 F.2d 655, 664 (3d Cir. 1993)).[3]

EBI mischaracterizes Orthofix's position. Orthofix never argued that EBI's breach of the Agreement constituted a tort. Rather, it contended at trial that EBI improperly sold the fixators and, thereby, interfered with Orthofix's economic relationships.

In denying EBI's post-trial motion for judgment as a matter of law on this issue, the District Court concluded that there was evidence that EBI used fraudulent and unlawful means to obtain the fixators and, just as important, that EBI then sold the fixators in direct competition with Orthofix. The court held that, from this evidence, the jury could have concluded that EBI engaged in tortious interference by over-ordering, regardless of whether the

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[2] This tort requires proof of five elements: (1) plaintiff's expectation of economic benefit; (2) defendant's knowledge of that expectation; (3) defendant's wrongful, intentional interference with that expectancy; (4) the reasonable probability of benefit to the plaintiff in the absence of that wrongful interference; and (5) damages. *See Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1167 (3d Cir. 1993). EBI's appeal contends that there was a failure of proof on element (3).

[3] Orthofix again contends that EBI waived its appeal for this position, because EBI moved exclusively on the grounds of sufficiency of the evidence, not whether the conduct would amount to tortious interference. However, EBI did raise the claim that the conduct amounted only to breach of contract and not tortious interference in its Rule 50(b) motion. Thus, we reject Orthofix's argument.

act of over-ordering breached the contract. *Inter Med. Supplies*, 975 F. Supp. at 687.

We agree. Although Orthofix does suggest that some of EBI's conduct in obtaining the excessive quantities of fixators contributes to its tortious interference claim, it also emphasizes that EBI tortiously interfered by selling those products to the very customers that otherwise would have been purchasing from Orthofix.

Moreover, the jury was entitled to conclude that EBI's proffered justification for its conduct did not completely explain its actions. EBI argued that the actions it took were defensive, designed to protect itself against the coming loss in business expected to result from the termination of its Orthofix distributorship. However, Orthofix introduced evidence that EBI's president described his company's post-Agreement relationship with Orthofix as a "war," and his objective as being to "destroy Orthofix." App. at 507. With this evidence, the jury was entitled to conclude that EBI's explanation for acquiring and selling the fixators was inadequate to explain its decision to compete in the market when and how it did, and that its conduct was tortious interference with Orthofix's prospective economic advantage.

We conclude that the District Court did not err in denying EBI's motion for judgment as a matter of law on this ground.

D. Compensatory Damages

EBI next challenges the $48 million compensatory damages award, and asserts that the District Court erred in permitting Orthofix to recover any compensatory damages because the amount of such damages was speculative. In doing so, EBI expands on its argument that the District Court erred in denying the motion for judgment as a

matter of law on the breach of contract and tortious interference counts because Orthofix failed to establish specific damages associated with each cause of action. Relying on our statement in *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975)—"we cannot permit a jury to speculate concerning the amount of losses resulting from unlawful, as opposed to lawful, competition"—EBI contends that the jury's award here was impermissible speculation.

Although the award appears large, we review it keeping in mind the following observation by the District Court, which was intimately familiar with the case and the evidence:

> In an effort to maintain their commanding position as the leading United States marketer of external bone fixators until such time as their own products could be successfully launched, defendants attempted to secure a large inventory of Orthofix products. That plan was largely successful, and Orthofix is no longer a major force in the United States market for external bone fixation devices.

Inter Med. Supplies, 975 F. Supp. at 685. EBI's actions thus secured for it the market that had previously been Orthofix's, an injury from which Orthofix has not recovered.

EBI makes essentially three arguments against the award of compensatory damages: First, that Orthofix's consultant created flawed market projections, and that Creighton Hoffman, the Orthofix expert who ultimately testified, prepared damage estimates in reliance on these projections; second, that Hoffman's testimony departed from the consultant's analysis with respect to the recapture of profit and relied instead on inflated market share

projections made by Orthofix's executives; and third, that Hoffman improperly inflated his damage estimates by taking sales growth data prepared by EBI's own damage experts out of context and applying it to a situation that did not reflect actual market conditions.

These arguments echo those EBI presented to the District Court in a motion *in limine* and in motions for judgment as a matter of law. The court rejected EBI's arguments, focusing first on Hoffman's testimony and then emphasizing that "while [the analysis] certainly yielded a large number, [it] was not flawed as a matter of law. The jury could have rejected that testimony in its entirety. It did not." *Id.* at 691. The court further observed that EBI's economic expert also testified and that the jury presumably took the time and effort to consider carefully the damages evidence each side presented. *Id.*

The disputed calculation proposed lost profits not exceeding $95 million and actual damages not in excess of that number. The District Court rejected EBI's complaint that the damages were "undifferentiated," noting that "[p]laintiffs tried this case on numerous alternative theories of liability each of which would support an award of 'lost profits.' To the extent the plaintiffs prevailed on any theory which was supported by sufficient evidence, they are entitled to the full measure of compensatory damages, and no more." *Id.* Referring to Orthofix's expert's testimony, the District Court rejected EBI's complaint that Orthofix failed to present testimony separating the damages by entity and by claim. The court suggested that such specificity would have created jury confusion, as well as a strong potential for duplicative or excessive damages. *Id.* The court explained:

> Because all of the claims upon which plaintiffs prevailed arose from the same set of facts surrounding

> the defendants' plan to convert the Orthofix external fixator market to the purchase of Dynafix, and because that plan succeeded, plaintiffs' lost profits need not be assigned to a given legal theory. Damages ordinarily flow from conduct, not from legal theories.

Id.

We review the District Court's denial of post-trial motions regarding that compensatory damages verdict for abuse of discretion. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 437 (1996); *American Nat'l Bank & Trust Co. v. Regional Transp. Auth.*, 125 F.3d 420, 437 (7th Cir. 1997).

Although New Jersey law requires a "reasonably accurate and fair basis for the computation of alleged lost profits," *J.L. Davis & Assocs. v. Heidler*, 263 N.J. Super. 264, 276, 622 A.2d 923, 929 (Sup. Ct. App. Div. 1993) (citation omitted), the fact that a plaintiff may not be able to fix its damages with precision will not preclude recovery of damages. *See American Sanitary Sales Co. v. New Jersey*, 178 N.J. Super. 429, 435, 429 A.2d 403, 406 (Sup. Ct. App. Div. 1981). EBI's arguments addressing the reliability and source of Hoffman's data presumably were made with equal force to the jury. Hoffman was cross-examined at length, and EBI presented its own damages expert who painted a more conservative view of Orthofix's economic prospects. The District Court properly held that the credibility of the experts was for the jury to determine, and we see no reason for concluding that there was an abuse of discretion.

E. Punitive Damages

The most troublesome issue on appeal is that presented by the jury's award of punitive damages in the amount of $100,600,000 remitted by the District Court to $50,000,000.

EBI argues at the outset that we must reverse the punitive damages award because the jury's verdict, which does not distinguish between tort and breach of contract damages, leaves us no basis to apply the New Jersey Act, which limits a plaintiff's punitive damages to either $350,000, or five times the compensatory damages, whichever is greater. N.J. Stat. Ann. § 2A:15-5.14. It reasons that because punitive damages are not available for breach of contract, this court cannot determine whether the strictures of the New Jersey Act are met without determining what portion of the $48 million compensates for tort violations in this case.

Orthofix responds that EBI waived this argument by failing to object to the jury instructions and the verdict sheet when they were presented. We agree. EBI's trial counsel did not object on the ground now pressed, either when the instructions and verdict sheet were given to the jury or when the jury returned.[4] We believe, in line with other circuits, that EBI's failure to object at the time the jury received the proposed verdict sheet or when the jury returned constitutes a waiver of this objection. *See Austin-Westshore Constr. Co. v. Federated Dep't Stores, Inc.*, 934 F.2d 1217, 1226 (11th Cir. 1991) (party waived objection to any inconsistency in jury response to special interrogatories by failing to raise issue before jury was excused); *White v. Celotex Corp.*, 878 F.2d 144, 146 (4th Cir. 1989) (same); *Stancill v. McKenzie Tank Lines, Inc.*, 497 F.2d 529 (5th Cir. 1974) (same). Even if this argument were not waived, the breaches of contract here

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[4] The District Court did address EBI's argument that the verdict sheet failed to distinguish among the various defendants, but found that the verdict was consistent with the defendants' own requested charge, which did not require the jury to list each award separately. *Inter Med. Supplies*, 975 F.2d at 697. EBI has not raised this issue on appeal.

were so intertwined with the tortious scheme to steal Orthofix's market that the full award is properly attributtable to the tortious conduct.

We turn then to EBI's challenge to the punitive damages award. EBI claims that the award, even as remitted by the District Court, is inconsistent with both the New Jersey Punitive Damages Act, N.J. Stat. Ann. § 2A:15-5.9 *et seq.*, and the Due Process Clause of the Fourteenth Amendment.[5] It argues that the jury awarded punitive damages from passion and prejudice, that Orthofix failed to produce evidence of some defendants' financial condition as required by the New Jersey Act, and that even the $50 million punitive damages award is excessive.

The standard of review that we apply depends upon the particular challenge asserted. To the extent that EBI complains about the admission of certain evidence, we review the District Court's ruling under an abuse of discretion standard. *See Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 270-71 (5th Cir. 1994). To the extent that the issues EBI raises have a legal component, our review is plenary. *See Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1334 (11th Cir. 1999).

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[5] There are no reported New Jersey Supreme Court opinions that the parties have cited or we have found which interpret the Act. *See Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1373 n.15 (3d Cir. 1996) ("When a federal court exercises diversity jurisdiction, it must apply the substantive law as decided by the highest court of the state whose law governs the action."). The Act requires a trial court judge to "ascertain that the award is reasonable in its amount and justified in the circumstances of the case, in light of the purpose to punish the defendant and to deter the defendant from repeating such conduct." N.J. Stat. Ann. 2A:15-5.14(a). The parties have not argued that this act expands protection against excessive punitive damages awards beyond the minimum guarantees of the Due Process Clause of the Fourteenth Amendment.

The Supreme Court has stated that state law governs the propriety of awarding punitive damages and the factors to be considered in determining the amount, but that federal law controls "those issues involving the proper review of the jury award by a federal district court." *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989).

1. *Passion and Prejudice*

If it can be shown that a jury verdict resulted from passion or prejudice, a new trial is the proper remedy. *See Dunn v. Hovic*, 1 F.3d 1362, 1383 (3d Cir. 1993) (en banc). EBI argues that the sheer size of the award here demonstrates that the jury's decision was a product of passion and prejudice. However, in *Dunn* we declined to find that there is "some level of award that would in itself evidence prejudice and passion," and held that even if there were such a level, the award in *Dunn*, $25,000,000, would not have reached it. *Id.*

EBI also argues that several statements made by Orthofix concerning EBI's counsel and EBI's alleged violations of the FDCA inflamed the jury and contributed to the prejudice, warranting reversal. The District Court rejected this argument, noting that EBI requested and received its own curative instruction. *Inter Med. Supplies*, 975 F. Supp. at 690 ("[T]o the extent there may have been any prejudice, defendants sought and obtained a curative jury instruction, [and] the present assertion of prejudice is without merit.") Indeed, EBI represented to the District Court that the instruction given "perfectly addresse[d] the concern with FDA." *Id.* (citation omitted).

We have reviewed the closing argument, the objections raised in the District Court, and the curative instruction. We do not find sufficient support for EBI's allegation of

a connection between counsel's remarks in closing and the size of the verdict to warrant granting a new trial. This is especially true where EBI received the curative instruction it requested and did not object to any improper references to counsel during the closing argument. We conclude, therefore, that the District Court did not err in rejecting EBI's arguments that the verdict was the product of passion or prejudice.

2. *Evidence of Defendants' Financial Condition*

EBI also challenges the award on the ground that Orthofix failed to provide evidence of some defendants' net worth. Under the New Jersey Act, a trier of fact assessing the award of punitive damages "shall consider . . . [t]he financial condition of the defendant," N.J. Stat. Ann. 2A:15-5.12(c), in order to formulate an award which is "specific as to [each] defendant," N.J. Stat. Ann. 2A:15-5.13. EBI argues that Orthofix failed to establish an essential element of punitive damages under New Jersey law by not producing evidence concerning the financial condition of two of the corporate defendants, Electro-Biology and EBI Medical Systems.

There is some question whether this issue has been waived because it was not raised before the District Court. In any event, the record establishes that Orthofix did introduce evidence of both EBI Medical Systems' sales and revenues and Biomet's net worth. Arguably, these are an imperfect measure of the financial condition of Electro-Biology itself, but the corporate and accounting structures of these companies make this evidence adequate to meet the requirements of the New Jersey Act. EBI Medical Systems is the sales and marketing subsidiary of Electro-Biology, a company that has no sales of its own. Moreover, Biomet did not maintain separate balance sheets

that would document separate net worth calculations for its subsidiaries. Thus, the District Court did not err in permitting an award of punitive damages.

3. *Excessive Damages*

Finally, we consider EBI's contention that the punitive damages award is excessive. EBI not surprisingly relies on *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the case in which the Supreme Court first struck an award of punitive damages as excessive under the Due Process Clause of the Fourteenth Amendment.

In that case, an Alabama purchaser of a new BMW automobile sued the manufacturer for its failure to notify him that his automobile had been repainted. Under BMW's policy, it sold unused but repaired cars as new unless the cost of the repair exceeded three percent of the car's suggested retail price. It gave the purchasers, including plaintiff, no notification of the repainting because the cost of that repair did not meet the policy's minimum. The plaintiff claimed that the repainting impaired the car's value by approximately ten percent of the $40,000 price, or $4000 in actual damages, and introduced evidence that BMW had sold nearly one thousand repainted cars. The plaintiff argued that the appropriate penalty was $4 million. *Id.* at 563-64.

Alabama law permitted an award of punitive damages when a defendant engaged in "gross, oppressive or malicious fraud." *Id.* at 565. The jury concluded that BMW's nondisclosure policy constituted such fraud, and awarded both the requested actual damages and the $4 million in punitive damages. *Id.* The Alabama Supreme Court reduced the award to $2 million because the jury's calculation included sales in other jurisdictions; it upheld the award in all other respects. *Id.* at 566-67.

The Supreme Court reversed. The Court reaffirmed the states' traditional authority to punish and deter wrongdoers for acts committed within the jurisdiction, and noted that states have "considerable flexibility" in achieving those goals. *Id.* at 568. However, it cautioned that a state must avoid "grossly excessive" awards that "enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *Id.* Observing that "[e]lementary notions of fairness" require "fair notice" to a defendant of both the conduct punishable and the severity of the potential penalty, the Court identified three "guideposts" as indicia of the reasonableness of a punitive damages award: "the degree of reprehensibility of the [conduct]; the disparity between the harm or potential harm suffered . . . . and [the] punitive damages award; and the difference between this [punitive] remedy and the civil penalties authorized or imposed in comparable cases." *Id.* at 574-75.

The Court considered the degree of reprehensibility to be "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *Id.* at 575. The Court observed that "some wrongs are more blameworthy than others" so that " 'trickery and deceit' . . . are more reprehensible than negligence." *Id.* at 575-76. It concluded that none of the aggravating factors were associated with BMW's conduct and observed that the plaintiff's injury was "purely economic in nature." *Id.* at 576. The Court stated that although intentional economic misconduct warrants punishment, particularly if inflicted on a financially weak and vulnerable entity, "this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages." *Id.* Although punitive damages were warranted because BMW had intentionally omitted a material fact, the fact that the company also could have be-

lieved that it had no disclosure duty mitigated the egregiousness of the conduct.

"The second . . . indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *Id.* at 580. The Court observed that it had looked to the ratio between the punitive and compensatory damages on other occasions. In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 23-24 (1991), it had held that a four-to-one ratio did not "cross the line into the area of constitutional impropriety," and in *TXO Production Corp. v. Alliance Resources, Corp.*, 509 U.S. 443, 460 (1996), it had held permissible a ratio that did not exceed ten to one once the potential harm to that plaintiff was taken into account. In considering the ratio guidepost, the Court observed that:

> [L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

BMW, 517 U.S. at 582.

In *BMW*, the Court followed its practice of declining to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.* at 583 (citation omitted). Rather, it stated that the concern should be for reasonableness. *Id.* In the case of the plaintiff purchaser of the BMW, the $2 million punitive damages award produced what the Court described as "a breathtaking 500 to

1" ratio between the penalty and plaintiff's actual damages, *id.* at 583, and was thirty-five times greater than the total damages of all fourteen Alabama purchasers, *id.* at 582 n.35.

Finally, in discussing the third indicium of excessiveness, a comparison of the punitive damages and the potential civil or criminal penalties for comparable misconduct, the Court reiterated its deference to legislative judgments regarding appropriate sanctions. *Id.* at 583 (citing approvingly *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor,J., concurring in part and dissenting in part)). The appropriate comparison, the Court suggested is between the statutorily authorized financial penalty (when there is no imprisonment) and the punitive damages award.

In explaining its decision to reverse the judgment on punitive damages and remand, the Court noted that BMW lacked any notice that its conduct, which would have given rise to a $2000 fine under the state's Deceptive Trade Practices Act, Ala. Code § 8-19-11(b) (1993), could result in a multimillion dollar penalty, and that there was no basis for assuming that BMW, which did change its policy, would not have done so after receiving a lesser sanction. *Id.* at 584-85. Even without drawing "a bright line marking the limits of a constitutionally acceptable punitive damages award," the Court was convinced that the award in *BMW* was "grossly excessive." *Id.* at 585.

The Supreme Court's decision in *BMW* provides us with an analytic framework to consider whether the now reduced $50 million punitive damages award remains excessive. In two recent cases, the Court of Appeals for the Tenth Circuit has applied the *BMW* criteria, concluding in both that the punitive damages awards were excessive

even though not all three of the indicia of excessiveness identified by the Supreme Court were present. In *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 104 F.3d 634 (10th Cir. 1996), the jury awarded actual damages of $269,000 and punitive damages of $30 million on claims of tortious interference with both prospective business advantage and contract. *See id.* at 635. Although the defendant was aware of the possibility of such a large award (one of the "guideposts"), the court of appeals directed a remittitur to $6 million because the harm inflicted by the defendant was purely economic in nature and the ratio between the compensatory and punitive damages was too high. *Id.* at 640-42. In *FDIC v. Hamilton*, 122 F.3d 854 (10th Cir. 1997), the court directed a reduction of punitive damages award from $1.2 million to $264,000 for similar reasons.

The Tenth Circuit's summary of the factors to be considered in determining the degree of reprehensibility of a defendant's conduct is useful: whether it "cause[d] economic rather than physical harm; would be considered unlawful in all states; involves repeated acts rather than a single one; is intentional; involves deliberate false statements rather than omissions; and is aimed at a vulnerable target." *Continental Trend Resources*, 101 F.3d at 638; *accord Hamilton*, 122 F.3d at 861; *see also Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996) (identifying presence of violence, deceit or malice and the repetition of conduct as aggravating factors in determining degree of reprehensibility).

Applying those factors, we note the harm inflicted on Orthofix was economic, rather than physical, and hence "less worthy of large punitive damages awards than torts inflicting injuries to health or safety." *Continental Trend Resources*, 101 F.3d at 638. It has been suggested that,

"[w]hen the injury is economic, and particularly when it arises out of a contractual relationship where the parties can and should contractually protect themselves by providing for explicit remedies in the event of breach, the permissible ratio of punitive damages to actual damages should be relatively modest." *Hamilton*, 122 F.3d at 862. Relevant also is that Orthofix is not a financially weak or vulnerable target. Another factor that tends to mitigate the need for a high punitive damages award is the jury's finding that Orthofix itself breached the distributor agreement, failed to fill and ship EBI's legitimate orders, and engaged in tortious acts.

We recognize that the jury found, as instructed under New Jersey law, that EBI acted with either "actual malice" or "a wanton and willful disregard of persons who foreseeably might be harmed," N.J. Stat. Ann. 2A:15-5.12 (a), that EBI's plan "involved acts of deception and, at least, reckless disregard of the consequences to Orthofix," *Inter Med. Supplies*, 875 F. Supp. at 700, and that those acts continued over an extended period of time with full awareness of the harm to Orthofix, *see* N.J. Stat. Ann. § 2A:15-5.12(b).

Nonetheless, balancing these facts with respect to reprehensibility, we conclude that EBI's conduct, which inflicted only economic harm for which large compensatory damages have been awarded, was not sufficiently egregious to warrant a punitive damages award of $50 million. In this connection, we take into consideration that high, easily calculable compensatory damages may more appropriately be accompanied by a lower punitive damages ratio. *See BMW*, 517 U.S. at 582.

Finally, we find reference to the sanctions for comparable misconduct (the third guidepost) unhelpful here, as there is no clearly applicable reference point. EBI offers

two potential comparisons. First, it suggests that the $50 million award here is higher even than the $30.5 million fine imposed for shipping adulterated medical devices that caused deaths, *see United States v. C.R. Bard, Inc.*, 848 F. Supp. 287, 290 (D. Mass 1994), conduct far more egregious. Second, EBI notes that the potential fine under the United States Sentencing Guidelines calculation to deprive a defendant of the profit from his wrongdoing would be only $500,000, which is 1/100 of the punitive damages award here. *See* U.S.S.G. §§ 8C2.4(a), 8A1.2, comment (n.3(h)). Orthofix counters that federal and state laws contain numerous authorizations for treble damages when a defendant engages in unfair business conduct and competition. *See, e.g.*, 15 U.S.C. § 15 (antitrust); 18 U.S.C. § 1964 (RICO); N.J. Stat. Ann. § 56:4-2 (unfair trade practices). However, even trebling $500,000 would significantly reduce the punitive damages award from the $50 million figure.

Because we have concluded that the punitive damages award should be reduced in light of the first guidepost, we need not decide between these competing statutory comparisons. We agree with the Tenth Circuit's observation that "a violation of common law tort duties [may] not lend [itself] to a comparison with statutory penalties. The fundamental question is whether [the defendant] had reasonable notice that its tortious interference with contracts and prospective business advantage could result in such a large punitive award," *Continental Trend Resources*, 101 F.3d at 641 (citing cases involving high punitive damages awards for tortious interference claims).

Once we have determined that a punitive damages award as high as that set here does not accord with the analysis recommended by the Supreme Court in *BMW*, we are left to fulfill our role as gatekeeper in reviewing an

award of punitive damages. *See Dunn*, 1 F.3d at 1382. It is not an enviable task. We have searched vainly in the case law for a formula that would regularize this role, but have not found one. As we noted above, the Supreme Court has instructed as to the analysis but has provided nothing concrete as to the amount. Justice Kennedy's comments in his separate opinion in *TXO* reflect the frustration of many judges faced with the need to set a figure.

> To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what? The answer excessive in relation to the conduct of the tortfeasor may be correct, but it is unhelpful, for we are still bereft of any standard by which to compare the punishment to the malefaction that gave rise to it. A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution. This type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend.

TXO, 509 U.S. at 466-67 (Kennedy, J. concurring).

In the last analysis, an appellate panel, convinced that it must reduce an award of punitive damages, must rely on its combined experience and judgment. When different members reach different figures, they must seek an accommodation among their views, a process that recurs throughout appellate decision making. After reviewing the record and the arguments in this case, we conclude that the proper, reasonable punitive damages award is no more than $1 million.[6]

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[6] Because of the extent to which we have reduced the punitive damages verdict, we need not address EBI's contention that the

In his passionate dissent, Judge Garth argues that we have ignored our precedent as to the standard of review applicable to a district court's ruling on punitive damages, which he asserts must be accorded "heightened deference," particularly if the district court has previously granted a remittitur. The brief passage in our 1992 opinion in *Keenan v. City of Philadelphia*, 983 F.2d 459 (3d Cir. 1992), to which he alludes, is not this court's latest writing on that issue. Instead, this court's 1993 opinion in *Dunn*, where we spoke *en banc*, represents our most recent and considered opinion on the issue of punitive damages, and particularly on punitive damages following a District Court remittitur. *See Dunn*, 1 F.3d at 1382-91.

In *Dunn*, we did not enunciate any rule of extraordinary deference to the district court's decision, as Judge Garth would have us adopt. Instead, although the district court there had reduced by remittitur the jury's punitive damages award from $25 million to $2 million (a considerably larger percentage reduction than that ordered by the District Court here), we nonetheless decided that an additional reduction was appropriate and reduced the already remitted damages from $2 million to $1 million. *Id.* at 1391. We stated that we were further reducing the punitive damages award because we believed that the "district court gave insufficient consideration to the effect of successive punitive awards in asbestos litigation." *Id.*

We discussed at great length this court's role in the assessment of punitive damages. Contrary to Judge Garth's position, the *en banc* court stated: "We cannot leave the amount of punitive damages solely to the trial court because it is evident to us that the Supreme Court

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$50 million award is excessive because it constitutes 3.3 percent of Biomet's net worth, far above the one percent we allowed in *Dunn*, 1 F.3d at 1383.

in *Haslip* approved review by an appellate court to 'determin[e] whether a particular award is greater than reasonably necessary to punish and deter.'" *Dunn*, 1 F.3d at 1385 (alterations in original).

Thus, notwithstanding the deference which we accord the trial court in such matters, and notwithstanding our commendation of "the district court's discipline in reducing the punitive damages from $25 million to $2 million," *id.* at 1391, we undertook to further reduce the punitive damages upon our determination "that further remittitur of the punitive damage award in this case is appropriate," *id.* In light of that further reduction, the dissent's insistence that *Dunn* is not relevant to the standard of review when a district court orders a remittitur is surprising. The dissent's attempt to confine *Dunn* to product liability cases is unpersuasive. *Haslip*, on which we relied in *Dunn*, was not a products liability case. This court's recent opinion, *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95 (3d Cir. 1999), that was also not a products liability case, cited *Dunn* for its discussion and holding regarding punitive damages. *Id.* at 114.

The centerpiece of the dissent is its reliance on our pre-*Dunn* opinion in *Keenan*. The dissent fails to point out that notwithstanding the "super-deference" to the district court, which the dissent claims *Keenan* requires, in *Keenan* we reversed the punitive damages assessed against one of the defendants after finding that there was inadequate evidence to support their imposition. 983 F.2d at 471. Moreover, *Keenan* itself undermines the dissent's attempt to cabin damages in products liability cases in a separate category. *Keenan* relied for the standard of review for excessiveness on an earlier Third Circuit case, *Gumbs v. Pueblo International, Inc.*, 823 F.2d 768 (3d Cir. 1987), where, again notwithstanding the deference

owed to the district court since it granted a remittitur, we reversed the imposition of compensatory damages as excessive. The *Gumbs* court in discussing the standard of review, relied on an earlier Third Circuit decision, *Murray v. Fairbanks Morse*, 610 F.2d 149 (3d Cir. 1979), which was a products liability case. *See Gumbs*, 823 F.2d at 771. It is thus evident that there is no basis to consider damages in products liability cases as a separate category, and we certainly did not so suggest in *Dunn*.

The dissent gives short shrift to *Haslip*, despite the fact that *Haslip* issued from the Supreme Court, because that opinion failed to satisfy Judge Garth's need for "a formulaic standard of review." I agree that our task as appellate judges in reviewing damages awards, whether or not there has been a remittitur, would be facilitated if there were a formula, but not all of our review function can be compressed into a formula, and the guideposts provided by the *BMW* opinion adequately serve that function.

The cases cited by Judge Garth and those that were relied upon in our earlier decision in *Keenan* for the proposition that we owe heightened deference to the district court's remittitur decision—*Delli Santi v. CNA Insurance Cos.*, 88 F.3d 192 (3d Cir. 1996); *Starceski v. Westinghouse Electric Corp.*, 54 F.3d 1089 (3d Cir. 1995); and *Gumbs v. Pueblo International, Inc.*, 823 F.2d 768, 771-72 (3d Cir. 1987)—were all compensatory damages cases and not punitive damages cases. In punitive damages cases we must be informed by the Supreme Court's jurisprudence and, as noted above, that jurisprudence counsels intensive review.

As we noted above, our decision in this case to reduce the punitive damages award even further is based upon the guideposts established by the Supreme Court. And, in the last analysis, we conclude that an award greater than

$1 million is not "reasonably necessary to punish and deter." *Haslip*, 499 U.S. at 22.

III. CONCLUSION

In conclusion, we will affirm the District Court's decision on all grounds raised in this appeal other than the punitive damages and will remand so that the District Court can enter a judgment for punitive damages in the amount of $1 million.

GARTH, *Circuit Judge*, dissenting:

While I join the Court in its holding on all of the substantive issues discussed in section II.A through II.D of its opinion (with but one caveat stated in the margin),[1]

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[1] Each of the issues raised by EBI has been more than adequately explained and rejected by the majority opinion. However, I note that in one area, while I agree with the conclusion that the District Court's interpretation of Paragraph 6(d) of the parties' Distributor Agreement, containing the "in any way handle" clause precluded EBI from manufacturing or producing its own bone fixators during the course of the Agreement, I question whether the breadth of the majority's holding with respect to the District Court's charge truly represents the jurisprudence of this Circuit.

It must be remembered that the District Court had ruled, over EBI's objection, in an *in limine* proceeding that Orthofix's interpretation of the "in any way handle" clause was correct, which then became the law of the case. At the conclusion of the trial, EBI submitted a proposed charge that affirmatively incorporated the District Court's interpretation of Paragraph 6(d), which the District Court adopted in all respects pertinent to this appeal. Once EBI had objected and presented arguments in support of its interpretation of Paragraph 6(d) at the *in limine* proceeding, I agree that thereafter EBI was not obliged to object to the charge of the District Court, which incorporated its *in limine* ruling, in order to preserve the issue on appeal. *See, e.g., Smith v. Borough of Wilkinsburg*, 147 F.3d 272 (3d Cir. 1998). However, I cannot agree that when EBI submitted its own charge that parroted in essential respects (*i.e.*, the interpretation of "in any way handle") the District Court's ruling, that EBI could thereafter raise the issue on appeal, claiming that it had preserved the issue, especially when the District Court essentially adopted EBI's proposed charge.

I know of no case in our Circuit where the submission of a requested charge which was then adopted by the District Court would not foreclose the party requesting the charge from thereafter being bound by it. Hence, although it does not disturb the disposition reached by the majority affirming the District Court's interpretation of Paragraph 6(d)—a disposition in which I join—I do raise a question as to the expansiveness of the doctrine arguably embraced by the majority. It seems to me that our opinion would be far more in tune with our prior precedents were we to restrict ourselves to approving preservation of an issue only when

I am obliged to write separately in dissent on the issue of punitive damages.[2]

I.

I am compelled to disagree with the majority's reduction of the punitive damages assessed against EBI not only because that monetary reduction has no principled basis, but also because the standard of review that this Court has previously established and announced has been totally ignored. *See Keenan v. City of Philadelphia*, 983 F.2d 459 (3d Cir. 1992). While *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir. 1993) (en banc), to which the majority refers, *see* Maj. Op. at 36, dealt with punitive damages but only in a product liability context, *i.e.*, asbestos damage awards, *Dunn* did not provide nor attempt to provide a standard of review that contradicted or overruled *Keenan*. Indeed, *Dunn* did not even cite to *Keenan* and the *Dunn* court, which was concerned solely with due process considerations, explained its result only in terms of successive and multiple damage awards which asbestos product liability cases might generate, a situation that obviously is not relevant in the present case. Neither *Dunn* nor *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), on which the majority relies in *Dunn* and which I discuss in Section III, *infra*, bear on the standard of review. Instead, the majority here has substituted its own discretion and judgment (see Maj. Op. at 35-36)—without warrant from precedent or statutory authority—for our announced standard of review, and for that of the District Court, to whose discretion and judgment we are bound to give a "super-" deference, especially after a grant

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the affected party had not in effect estopped itself by submitting a requested charge which affirmatively incorporated an adverse ruling.

[2] Punitive damages are discussed by the majority in Section II.E of its opinion.

of remittitur. *See also Tingley Sys., Inc. v. Norse Sys., Inc.*, 49 F.3d 93 (2d Cir. 1995) (reviewing decision to remit punitive damages under abuse of discretion standard; punitive award must "shock to conscience" to warrant reversal); *Hiltgen v. Sumrall*, 47 F.3d 695 (5th Cir. 1995) (reviewing remittitur under "considerable deference" standard).

Struggle as it might, the majority opinion still cannot explain why it fails to follow the controlling standard of review set forth in *Keenan*. *See* Maj. Op. at 37. The majority has sought to gloss over the significant differences between product liability cases, whose reductions of punitive damages awards stem from the fear of multiple and successive punitive awards, and cases such as this one where no such circumstances obtain. Moreover, the majority has not acknowledged that the cases on which it relies are fundamentally different from this case, in that those cases, such as *Haslip* and *Dunn*, were not concerned, as we are, with the standard of review, but rather were focussed on due process considerations.

Nor is the majority on sound ground when it points out that those cases that relied upon our *Keenan* standard of review did not uphold the district court's remittiturs. All that argument demonstrates is that the *evidence* in those cases—*Gumbs* and *Keenan*—did not satisfy our heightened standard of review.[3] In this case, Judge Orlofsky's discretion, based on the overwhelming evidence and the jury's 22 special verdict findings, more than satisfied that standard. Ergo, our decision should have been to affirm rather than to try to explain away what cannot be explained.

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[3] Of course, insofar as *Gumbs* was decided before *Keenan*, it did not have the benefit of the fully-enunciated and controlling standard established by *Keenan*, which in turn relied in part, and expanded upon *Gumbs*.

I recognize that the amounts of money involved are extremely substantial, and that even the least of those amounts is very significant. A reduction from $100,600,000 jury verdict to a $50,000,000 remittitur award to the $1,000,000 majority award (without principled explanation or analysis) is eyebrow-raising. Even if I, like the majority, wanted to reduce the jury's award or Judge Orlofsky's remittitur because of their respective sizes, I could not bring myself to do so because no principled basis exists for such a dramatic reduction. I note also that it was because of the amount of punitive damages as well as our own desire to arrive at a principled formula for their ascertainment—a task at which the majority has not succeeded—that we devoted most of the time allotted at oral argument to that subject.

However, we should not and cannot be swayed by the dollar amount of the damages if the ultimate decision at which we arrive is a principled decision that respects the standard of review by which we are bound. Justice Frankfurter in *Rochin v. California*, 342 U.S. 165, 170 (1952) expressed it succinctly when he stated: "We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function." Our judicial function, as I perceive it, is to adhere to our announced standard of review until it is overturned by our entire Court or by the Supreme Court.

Thus, my primary focus in this dissent deals with the standard by which we must review the District Court's remittitur order. It is that standard which dictates the result I have reached and which gives rise to the flawed majority opinion respecting punitive damages. My secondary focus centers on the manner by which the majority has reduced Judge Orlofsky's remittitur in derogation of precedent and our standard of review.

Therefore, while I agree with the majority's disposition on all other issues, I respectfully dissent from the majority opinion as to the amount of punitive damages to which Orthofix is entitled. Rather, pursuant to our standard of review, I would affirm the District Court's remittitur of $50,000,000.

II.

This Court's review of a District Court's punitive damage remittitur is remarkably circumscribed and consists of three elements. We have held that when examining the excessiveness of a punitive damages award, our review "is [1] severely limited: [2] we may . . . reverse and grant a new trial only if the verdict is *so grossly excessive as to shock the judicial conscience.* [3] Where the district judge grants a remittitur, deference to the trial court is heightened. Our review requires additional deference to the district court since it already granted a remittitur." *Keenan*, 983 F.2d at 472 (internal quotations and citations omitted, and brackets and emphasis added). *Dunn* is not to the contrary, because as I have pointed out, *Dunn* is a due process/product liability case and it leaves intact the standard of review which *Keenan* announced when a district court orders a remittitur. Thus, because the trial judge is in the best position to oversee whether the jury verdict is rationally based, when the trial judge grants a remittitur this Court will not reverse unless we find the District Court abused its discretion when measured against our standard of "heightened deference." *Gumbs v. Pueblo Int'l, Inc.*, 823 F.2d 768, 771-72 (3d Cir. 1987). *See also Kazan v. Wolinski*, 721 F.2d 911 (3d Cir. 1983). *Cf. Delli Santi v. CNA Ins. Cos.*, 88 F.3d 192 (3d Cir. 1996); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089 (3d Cir. 1995).

Here, the jury awarded Orthofix $100,600,000 in punitive damages, a figure it evidently derived from evidence

in the record indicating that Biomet's cash on hand for the 1996 fiscal year was approximately $100,600,000. The District Court reduced this amount to $50,000,000 in its remittitur order, apparently to bring the award in line with the compensatory damages of $48,000,000 proven at trial and found by the jury. The District Court, which as the majority notes, was "intimately familiar with the case and the evidence," Maj. Op. at 24, had been involved with the litigation for over three years (including a two month trial) and in its discretion had equated the *punitive* damages to the *compensatory damages* on a 1:1 ratio.

Despite this exercise of the District Court's discretion, a discretion that the majority has found not to have been abused or to have "shocked the judicial conscience"—indeed, without any principled basis at all, with no reference to the record, and in utter disregard of our standard of review, the majority has further reduced the punitive damages from $50,000,000 to $1,000,000. Nor has the majority made any reference in its opinion to the "heightened deference" that we owe to the District Court when it has granted a remittitur.

The analysis provided by the majority to support its peremptory reduction of 98% (based on a reduction to $1,000,000) of the remitted punitive damages award is unprecedented in this Circuit. While the majority was correct in rejecting EBI's arguments for reduction based upon the "alleged passion or prejudice" of the jury, Maj. Op. at 28, the majority nonetheless has arbitrarily reduced the punitive damages award based only upon its interpretation of the "guideposts" found in *BMW of North America v. Gore*, 517 U.S. 559 (1996), and two Tenth Circuit cases that have sought to explain them, *FDIC v. Hamilton*, 122 F.3d 854 (10th Cir. 1997) and *Continental*

Trend Resources, Inc. v. OXY USA, Inc., 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997), as well as *Dunn*, 1 F.3d 1371.[4]

Specifically, the majority concludes that, based upon factors mentioned in those cases. "EBI's conduct, which inflicted only economic harm for which large compensatory damages have been awarded, was not sufficiently egregious to warrant a punitive damages award of $50 million." Maj. Op. at 34. I am hard pressed to understand that conclusion in light of the jury findings of egregious, intentional and deceitful behavior by EBI, and by the lack of record evidence in the majority opinion which could shore up such a reduced award.

The jury, in its responses on the special verdict sheet, answered that it had found by a preponderance of the evidence: that EBI intentionally and improperly interfered with Orthofix's reasonable expectations of economic advantage; that EBI wrongfully and intentionally interfered in the contractual relations between Orthofix and Inter Medical; that EBI made false statements either knowingly, recklessly or negligently that injured Orthofix; that EBI's conduct in "passing off" its own products as those of Orthofix was likely to cause confusion as to the source of those products; that EBI made false statements that deceived or were likely to deceive, in violation of the Lanham Act and to the likely detriment to Orthofix; that EBI had uttered injurious falsehoods in violation of the Lanham Act; and that EBI competed unfairly in violation of New Jersey statutory and common law. The jury further found by clear and convincing evidence that Orthofix had suffered harm as a result of EBI's actions and that EBI's conduct was actuated by "actual malice or were accompanied by a wanton and willful disre-

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[4] As I have earlier indicated, I believe the majority's reference to and reliance on *Dunn* is inapposite, as *Dunn* did not disturb our standard of review of remitted punitive damage awards in a non-due process/non-product liability context.

gard" of those who foreseeably would be harmed by its conduct.

Yet, despite these extraordinary findings, and despite the lack of evidentiary support, the majority relies on only one aspect of the element of "reprehensibility" [5] in deciding to reduce the District Court's remittitur: its conclusion that the damages inflicted by EBI were economic in nature. Maj. Op. at 33-34. I discuss this aspect of the majority opinion in section IV of this dissent, after noting the majority's failure to recognize and apply the Third Circuit standard of review pertaining to a punitive damages remittitur.

III.

I find fault with the majority opinion because, as I have already pointed out, the majority opinion has neglected either to state or to apply the standard of review relating to punitive damages. *See Keenan*, 983 F.2d at 472. I have recited our standard in the earlier portion of this dissent as review that is: 1) extremely limited with reference to the District Court's discretion; 2) subject to a "shock the conscience" scrutiny; and 3) characterized by a "heightened deference" when a remittitur has been granted, as there was here.

The majority opinion, in referring to our *en banc* decision in *Dunn*, which involved the due process impact

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[5] Although *BMW* is not on point with this case and is therefore distinguishable, it nonetheless specifies three guideposts for courts to consider in the punitive damages area. First and foremost is the egregiousness of the defendant's conduct, *i.e.*, deceit, fraud, etc., labeled "the degree of reprehensibility." *BMW*, 517 U.S. at 575. Second, is the ratio of punitive damages to "the actual harm inflicted on the plaintiff." *Id.* at 580. The third and final guidepost is a comparison to sanctions for comparable misconduct. *Id.* at 583. I agree with the majority that this third guidepost is not relevant to this appeal. Maj. Op. at 34.

of multiple and successive awards of punitive damages in asbestos-related injury cases, did not specify the standard of our review of a District Court's judgment. The nearest *Dunn* came to enunciating such a standard was its reference to the Supreme Court's decision in *Haslip*, 499 U.S. 1 (1991). *Haslip* stated that an appellate court should determine whether a particular award is "greater than reasonably necessary to punish and deter"—hardly a formulaic standard of review. *See Dunn*, 1 F.3d at 1385 (quoting *Haslip*, 499 U.S. at 19). That same rubric is repeated by the majority in this case. *See* Maj. Op. at 37 & 38. Significantly, however, just as *Haslip* provides no analysis to determine whether a particular award is "greater than reasonably necessary to punish and deter," neither does the majority here give us the benefit of its analysis and wisdom when it concludes (in citing *Haslip*) that any award larger than $1,000,000 is not "reasonably necessary to punish and deter." Maj. Op. at 38 (citing *Haslip*, 499 U.S. at 19)).

Hence, I emphasize and maintain that neither *Haslip* nor *Dunn*[6] has superseded this court's prescription held in *Keenan*, providing the appropriate standard of review after a remittitur has been ordered. This is particularly so, since there has been no endeavor on the part of the majority even to acknowledge the specific findings made by the jury and to analyze the District Court's opinion. That opinion discussed at length the factors to be given consideration under the New Jersey Punitive Damages Act.[7]

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[6] *Dunn*, of course, involved Virgin Islands common law, whereas the instant appeal is rooted in New Jersey statutory law, which governs the ultimate punitive damages award.

[7] The New Jersey Punitive Damages Act, among other provisions, provides that a jury may award up to 5 times the compensatory

Nor does the majority acknowledge that *Haslip* obviously informed this court's decision in *Keenan*. *Haslip* was decided in 1991, *Keenan* was decided a year later, in 1992, and *Haslip* was the subject of discussion in Judge Higginbotham's separate opinion. Accordingly, the majority's reliance on *Haslip* has little to do with its lack of reliance on *Keenan*. Further, *Keenan*'s standard of review has obviously survived even in light of *Dunn* because as mentioned *Dunn* has no relevance to the instant appeal. As noted, *Dunn* was a product liability case concerned with the implications of multiple and successive punitive damage awards as they are affected by principles of due process, which explains *Dunn*'s reliance on *Haslip*. *Haslip* also concerned the due process implications of punitive damage awards. 499 U.S. at 18.

A more pertinent precedent—cited in passing by the majority, *see* Maj. Op. at 28—is *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), which affirmed a punitive award of $6,066,082.74 and a compensatory award of $51,146, a ratio of approximately 12:1. In so holding, the Supreme Court prescribed that in reviewing a district court's decision whether to order a new trial on the issue of punitive dam-

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damages or $350,000, whichever is greater. N.J.S.A. 2A:15-5.14b. The Act is careful to circumscribe the essentials for a punitive damage award. It requires that the plaintiff prove, by clear and convincing evidence, that the harms alleged were caused by the defendant's acts or omissions, and that these acts or omissions were "actuated by actual malice or accompanied by a wanton and willful disregard" for those who might be harmed. N.J.S.A. 2A:15-5.12a. In this case, the jury's special verdict findings met each and every requirement of the Act. Hence, the jury's punitive damage award could have exceeded even its $100,600,000 punitive damages award if it had multiplied the $48,000,000 compensatory damages award by 5. As we noted in text, *infra*, and note 8, *infra*, the District Court, in reducing the punitive damage, fully addressed all elements of the Act. *See* N.J.S.A. 2A:15-5.12b.

ages, an appellate court has a "limited function" and affirmed the principle that appellate courts should "continue to accord considerable deference" to the district courts. 257 U.S. at 279. Undoubtedly, this prescription underlay the adoption by our court of the *Keenan* standard of review.

One appellate court has characterized a jury verdict that would "shock the conscience" as one that was so large as to be contrary to reason, or so exaggerated as to demonstrate the existence of bias or some other improper motive. *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778, 784 (5th Cir. 1983). Here, however, the majority does not hold that either the original jury award or the remitted award was so large as to be contrary to reason, nor could it. The defendants collectively are entities worth over $1 billion dollars, and a $50 million punitive damages award cannot be deemed unreasonable. Moreover, the majority explicitly holds that prejudice or bias was not a factor in the award. Maj. Op. at 28. Nor has the majority held (as I suggest it cannot in light of the record) that the District Court abused its discretion. Indeed, in its remittitur opinion, dated August 28, 1997, the District Court identified and discussed at length the seven factors required by New Jersey law in assessing whether the amount of a punitive damage award was reasonable.[8] Despite the dictates of our limited standard of review, at no point does the majority opinion even discuss this analysis by the District Court, nor explain how it believes the District Court abused its discretion.

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[8] The District Court considered the following: 1) the likelihood of serious harm resulting from EBI's misconduct; 2) EBI's awareness or reckless disregard of that likelihood; 3) EBI's conduct upon learning that their initial misconduct would likely cause harm; 4) the duration or any concealment of the misconduct; 5) the profitability of the misconduct; 6) when the misconduct was terminated; and 7) EBI's financial condition.

Having failed to explain and having failed to hold that the District Court abused its discretion, or that the award "shocked the judicial conscience," and having failed to give any deference, let alone "heightened deference" to the District Court's remittitur, it is evident that the majority has also failed to adhere to this Court's established standard of review, and has consequently erred in its decision.

IV.

The majority's arbitrary reduction in punitive damages to $1,000,000 is not justified by the evidence and is without any basis in principle or precedent. Moreover, the authorities to which the majority has looked for guidance, argue instead for affirming the District Court's remittitur. Indeed, no case cited by the majority has held definitively that cases involving *only* economic controversies warrant a lower punitive damages award than those involving *non-economic* damages such as threats to public health.

While the *BMW* Court suggested that economic harm alone is not normally associated with "particularly reprehensible conduct," 517 U.S. at 576, that is only one element of the "reprehensibility" analysis. *See Continental Trend Resources,* 101 F.3d at 638; *Lee v. Edwards,* 101 F.3d 805 (2d Cir. 1996) (listing other elements). The other elements which must be taken into account, such as intentionality, repetitive conduct, and conduct involving deliberate false statements, etc., were all found by the jury to have occurred in this case.

However, evidence produced at trial, but not mentioned in the majority opinion, indicated that EBI's conduct could involve potential physical harm to the wider community as well as economic harm. EBI was found liable for passing off its own products as those of Ortho-

fix, a recognized and respected manufacturer of bone fixators. There is evidence in the record that on at least one occasion, the deceptive substitution of EBI bone screws and ankle clamps for use in conjunction with Orthofix fixators could have injured patients. Therefore, the jury could well have concluded that the deceptive practices engaged in by EBI not only caused economic damage to Orthofix, but also exposed orthopedic patients to increased harm, to say nothing of the liability of hospitals when they unknowingly used EBI's bone screws and clamps believing them to have been manufactured by Orthofix. Even if this evidence is disregarded—as the majority disregards it—and even if one focuses only on the economic aspects of the damages caused by EBI, this Court must still affirm by deferring to the District Court's remittitur.

As mentioned, EBI was found to have engaged in a series of continuous and intentional deceptive acts in order to steal a market from Orthofix worth approximately $95 million. This evidence, which the majority credits, Maj. Op. at 33-34, is more than sufficient to justify the jury's finding of reprehensible conduct, which is the "most important indicium" among the guideposts.[9] *BMW*, 517 U.S. at 575. *See also* note 5, *supra*. That finding distinguishes this case from *BMW* in which the Supreme Court found "none of the aggravating factors" associated with reprehensible conduct. 517 U.S. at 576. Indeed, the Supreme Court in *BMW* indicated that cases involving such deceptive conduct would justify a high punitive award. 517 U.S. at 576 ("[I]nfliction of eco-

[9] Indeed, the majority concedes that the full award of compensatory damages can be credited to EBI's tortious conduct: "[t]he breaches of contract here were so intertwined with the tortious scheme to steal Orthofix's market that the full award is properly attributable to the tortious conduct." Maj. Op. at 27.

nomic injury, especially when done intentionally through affirmative acts of misconduct . . . can warrant a substantial penalty"). *Cf. Balsamides v. Perle*, 712 A.2d 673, 685 (N.J. App. Div.) (stating punitive damages can be awarded for breach of contract in commercial dispute where there has been a "breach of trust beyond the contractual breach"), *certif. granted*, 719 A.2d 1023 (N.J. 1998).

The specific cases relied upon by the majority do not support its holding that economic damages alone justify a lowering of a punitive damages award. While the Tenth Circuit in *Continental Trend Resources* and *Hamilton* did discuss the economic nature of the damages, the holdings of those cases were far more concerned with the constitutionality of the ratio of punitive damages to compensatory damages—another of *BMW*'s "guideposts." *See BMW*, 517 U.S. at 580.

The majority understandably does not dwell on the ratio of the jury's compensatory damages award of $48,000,000 to its proposed punitive damage award of $1,000,000. It makes no such comparison because in each of the cases cited, the punitive damages were far greater than the compensatory damages. *BMW*, which focussed on the ratio between punitive damages and compensatory damages, implicitly assumed the former would be higher than the latter in most cases. 517 U.S. at 580-82. Under the majority's approach here, the opposite is true and the majority's reliance upon *BMW* suffers because of that fact.

On the other hand, Judge Orlofsky's remittitur of $50,000,000, which I would affirm, when compared to the compensatory damages of $48,000,000, is essentially a 1:1 ratio, and well within the guidepost of *BMW*. The District Court's remittitur ratio is also a far more accept-

able ratio than even the 6:1 ratio found to be permissible by the Tenth Circuit, or the 4:1 ratio affirmed in *Haslip*. *See Hamilton*, 122 F.3d at 862; *Continental Trend Resources*, 101 F.3d at 643. Indeed, the Supreme Court has intimated that the ratio of punitive damages to compensatory damages could be even higher than 6:1 in economic damages cases taking into account the damages that would have accrued had the defendant succeeded in its egregious conduct. *BMW*, 517 U.S. at 581 (approving a 10:1 ratio in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) and stating that punitive damages should be assessed in the context of harm that was *likely* to occur as well as harm that *did* occur)). *See also Browning-Ferris*, 492 U.S. 257 (12:1); *Watkins v. Lundell*, 169 F.3d 540 (8th Cir. 1999) (4:1 ratio); *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123 (9th Cir. 1997) (6:1 ratio).

V.

Finally, I take issue with the standard against which the majority measured its award of punitive damages. The majority standard, rather than relying on our standard of review, alarmingly requires instead that an appellate panel "must rely on its combined experience and judgment" when reducing a remittitur. Maj. Op. at 36. The majority therefore, consonant only with its own devised standard and with reference only to its own judgment, holds, in conclusory fashion, that "[a]fter reviewing the record and the arguments in this case, we conclude that the proper, reasonable punitive damages award is no more than $1 million." Maj. Op. at 36. Any amount greater than that, the majority concludes, would not be "reasonably necessary to punish and deter." Maj. Op. at 38. As I have indicated, no analysis accompanies this *ipse dixit* conclusion.

Not only does this mysterious and unauthorized standard provide no instruction to the trial courts or litigants, but, as I have discussed above, it totally ignores our precedential standard of review, announced in *Keenan*, 983 F.2d 459, under which we are obligated to give additional deference to the district court's experience and judgment except where the award shocks the consience or when the district court has abused its discretion. Here, the majority has followed its own "merely personal and private judgment" in arriving at a proper amount of punitive damages, rather than confining itself to "the limits that bind judges in their judicial function." *See Rochin*, 342 U.S. at 170.

VI.

I acknowledge that punitive damages continue to be a problem vexing both the state and federal courts. *See* Milo Geyelin, *Philip Morris Hit with Record Damages*, WALL ST. J., March 31, 1999, at A3 (reporting punitive damage award of $80.3 million); Milo Geyelin, *Jury Awards $50 Million to Ex-Smoker*, WALL ST. J., Feb. 11, 1999, at A3 ($51.5 million). Yet, neither the state nor federal courts have fashioned a sure-fire recipe to solve the question of "how much,"[10] even though we have prescribed a formula—our standard of review—to be employed.

Nevertheless, a Court of Appeals cannot "willy-nilly," in an effort to reach what it considers to be the "right figure," arbitrarily pull a punitive damage award from the air as if it were a lottery number and announce "in our

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[10] In an effort to alleviate this problem, New Jersey, and recently Alabama, have joined a growing number of states which have responded with legislation governing the award of punitive damages. *See BMW*, 517 U.S. at 614-16 (Ginsburg, J., dissenting) (listing in appendix state statutes governing punitive damage awards).

judgment," this is it! I feel strongly that a court of review, such as we are, must not only furnish guidelines to the bench and bar, but even more importantly, it must set an example of correct judicial behavior by adhering to announced principles of jurisprudence. To do so, it must remain "within the limits that bind judges in their judicial function." *See Rochin*, 342 U.S. at 170. Failure to do so can lead only to arbitrary, capricious and/or emotional judgments beyond the realm of principle.

In this case, I believe the majority's decision, excellent in all other respects, has failed to adhere to its proper judicial function when speaking to the issue of punitive damages. It has failed to recognize what the court must regard as our declared standard of review—*see Keenan, Gumbs, Delli Santi, Starceski, supra*, etc. At the very least, the majority opinion has now added confusion to this court's standard by referring to a "standard" derived from inapposite cases which pre-existed *Keenan*. It has substituted its personal judgment for a principled review function over a District Court's discretion; and without relying on record evidence, it has reached a bottom line "lottery" figure of $1,000,000 relying only on its own "experience and judgment." Maj. Op. at 36. Such a practice is neither principled jurisprudence nor is it Third Circuit jurisprudence. If the majority now holds that, in light of the sequence of cases—*Haslip* in 1991, *Keenan* in 1992, and *Dunn* in 1993—and in light of the materially different contexts of these cases, that our remittitur standard of review has now been whittled down so that no analysis aside from an *ad hoc* panel's "combined experience and judgment" is required in reviewing a district court's remittitur, then all the more reason why this court must address and resolve this confusion by establishing firm guidelines.

Accordingly, I respectfully dissent from the standard of review and the resulting punitive damage award announced by the majority. Instead, I would affirm the District Court's remittitur of $50,000,000.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
D. NEW JERSEY

Civil Action Nos. 95-6035, 96-1047

INTER MEDICAL SUPPLIES LIMITED,
Plaintiff,
v.

EBI MEDICAL SYSTEMS, INC., ELECTRO-BIOLOGY, INC., and BIOMET, INC.,
Defendants/Counterclaimants,

ORTHOFIX, INC., and ORTHOFIX S.r.l.,
Plaintiffs,
v.

EBI MEDICAL SYSTEMS, INC., ELECTRO-BIOLOGY, INC., and BIOMET, INC.,
Defendants/Counterclaimants.

Aug. 28, 1997

OPINION

ORLOFSKY, District Judge:

This case was tried before a jury which returned a verdict in favor of the plaintiffs on their claims for breach of contract, breach of the duty of good faith and fair

dealing, tortious interference with prospective economic advantage, tortious interference with contract, defamation, unfair competition, and violation of the Lanham Act. The jury awarded the plaintiffs compensatory damages in the amount of $48,000,000.00 and $100,600,000.00 in punitive damages. The jury separately awarded plaintiff, Inter Medical Systems Ltd., $875,399.00 in damages for goods sold and delivered. The jury also found in favor of the defendants on their counterclaims for breach of contract, breach of the duty of good faith and fair dealing, tortious interference with prospective economic advantage, and tortious interference with contract. The jury awarded the defendants $1.00 in damages on these claims. The jury also found in favor of defendant, EBI Medical Systems ("EBIMS"), on its claim for breach of certain purchase order contracts, and awarded it $1.00 as a set-off against the claim of plaintiff, Inter Medical Systems ("IMS"), for goods sold and delivered.

Defendants have renewed their motion for judgment as a matter of law, made at the close of all the evidence, and have moved, in the alternative; for a new trial or remittitur of the jury's $100,600,000.00 punitive damages award. For the reasons set forth below, defendants' motion for judgment as a matter of law will be denied, and their alternative motions for a new trial or remittitur will be granted in part, and a remittitur of the punitive damages award to $50,000,000.00 will be ordered.

While these post-trial motions raise complex issues of law, many of which have been addressed by the court during the course of the trial of this case, one issue of particular interest not previously addressed requires this court to analyze the punitive damages award under New Jersey's Punitive Damages Act, which took effect on October 27, 1995. N.J. Stat. Ann. § 2A:15-5.14(a) (West

Supp. 1997). There are no reported New Jersey cases construing this subsection of the Act, or applying it to a case such as this. Therefore, this court must predict, without the benefit of guidance from any New Jersey court, how to construe and apply the Act in these circumstances.

I. Background

Orthofix, S.r.l., based in Milan, Italy, is a manufacturer of medical devices, including External Dynamic Axial Bone Fixator Systems, which are used in the treatment of severe fractures. These bone fixators attach to the bone through the skin, allowing the surgeon to manipulate the bone without repeated surgeries. The sale and distribution of these fixators form the subject matter of this litigation.

Plaintiffs, Orthofix S.r.l., Inter Medical Systems ("IMS"), a Cyprus-based marketing affiliate of Orthofix S.r.l. and a worldwide distributor of Orthofix products, and Orthofix, Ltd., based in London, England, are subsidiaries of Orthofix International B.V., which is based in the Netherlands. Orthofix International B.V., in turn, and Orthofix, Inc., a Texas corporation, formerly American Medical Electronics, Inc. ("AME"), are wholly-owned subsidiaries of Orthofix N.V., which is a publicly traded corporation.

For many years, the exclusive distributor of Orthofix products in North America and the Caribbean Basin was EBIMS, a Delaware corporation, having its principal place of business in Parsippany, New Jersey. EBIMS is a wholly-owned subsidiary of Electro-Biology Inc. ("EBI"), which, in turn, is a wholly-owned subsidiary of defendant, Biomet, Inc. Orthofix, Inc. is currently the exclusive distributor of Orthofix bone fixators in the United States.

EBIMS began distributing Orthofix products under an exclusive agreement in 1983. This relationship was memoralized in a series of written agreements, most recently, an agreement (the "Distributor Agreement"), entered into between EBIMS and Orthofix S.r.l. on June 1, 1990, which expired on May 31, 1995. The claims and counterclaims in this action arise out of the termination of the Distributor Agreement and the events surrounding it. When it became clear that EBIMS would not be renewed as the exclusive North American distributor of Orthofix products, EBI/Biomet decided to develop external bone fixators which would compete directly with Orthofix's products. In an effort to maintain their commanding position as the leading United States marketer of external bone fixators until such time as their own products could be successfully launched, defendants attempted to secure a large inventory of Orthofix products. That plan was largely successful, and Orthofix is no longer a major force in the United States market for external bone fixation devices.

Following a two month trial, at which the jury heard more than 5000 pages of testimony and endured numerous lengthy hiatuses while the parties debated points of law, the jury deliberated for over two days before reaching the verdict described above. It would disserve the jury system and dishonor the contribution of this dedicated jury to that system were the verdict to be lightly overturned.

II. Legal Standards

A motion for judgment as a matter of law "should be granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153,

1166 (3d Cir. 1993) (citations omitted). The standard for deciding a motion for judgment as a matter of law under Rule 50(b) is the same as it is under Rule 50(a). 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2537, at 347 (2d ed. 1995). This court may not question the credibility of witnesses or weigh conflicting evidence on a motion for judgment as a matter of law. *See Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 691 (3d Cir. 1993). Applying these principles, a renewed, post-verdict motion for judgment as a matter of law must be denied unless, viewing the evidence in the light most favorable to the verdict winner, "the record is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." *Rotondo v. Keene Corp.*, 956 F.2d 436, 438 (3d Cir. 1992) (internal citations and quotations omitted). Not only the facts of record, but all reasonable inferences which might be drawn from those facts must be viewed in the light most favorable to the verdict winner. *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 183 (3d Cir. 1992).

The decision whether to grant a new trial pursuant to Federal Rule of Civil Procedure 59(a) lies within the district court's sound discretion. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980); *Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002, 1017 (3d Cir. 1995). A new trial may be granted, on the basis that the verdict is against the weight of the evidence, " 'only where a miscarriage of justice would result if the verdict were to stand.' " *Klein v. Hollings*, 992 F.2d 1285, 1290 (3d Cir. 1993) (quoting *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1352 (3d Cir. 1991)). A new trial motion based upon the sufficiency of the evidence deserves especially close scrutiny because such a motion resembles a motion

for judgment as a matter of law, inasmuch as it invites the court to substitute its judgment for that of the jury. *Id.* On the other hand, when the movant seeks a new trial based upon trial error, the district court has somewhat greater discretion. Errors in judicial rulings or in the conduct of the court permit the court to order a new trial where the error or conduct was prejudicial. 6A James Wm. Moore, *Moore's Federal Practice* § 59.08(2) (2d ed. 1996). However, even if the court determines that an error was made, it should not grant a new trial unless it also determines that the error was so prejudicial that "refusal to take such action appears to the court inconsistent with substantial justice." Fed.R.Civ.P. 61. *See also Bhaya v. Westinghouse Elec. Corp.*, 709 F.Supp. 600, 601 (E.D. Pa. 1989), *aff'd*, 922 F.2d 184 (3d Cir. 1990). In order to mandate a new trial, an error in a jury instruction must be so substantial that, viewed in light of the charge as a whole, " 'the instruction was capable of confusing and thereby misleading the jury.' " *Link v. Mercedes-Benz*, 788 F.2d 918, 922 (3d Cir. 1986) (quoting *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183,.1195 (3d Cir. 1984)).

III. Discussion

A. Liability and Compensatory Damages

Defendants contend that the jury's verdict as to liability must be set aside. I will first address the numerous reasons defendants offer in support of this contention before turning to the award of punitive damages, which defendants also contest in this motion. Obviously, the jury's award of punitive damages, cannot stand in the event its findings as to liability and the accompanying compensatory awards must be reversed.

1. Plaintiffs' Tort Claims

Defendants contend that they are entitled to judgment as a matter of law on plaintiffs' claims for tortious interference with prospective economic relations and tortious interference with contract. Defendants' Brief at 19. The thrust of the defendants' argument in support of this contention is, as it was when defendants first moved for judgment as a matter of law on this basis, that Orthofix, S.r.l. has supported its claims that EBI tortiously interfered with its prospective business relationships with evidence of mere breaches of the Distributor Agreement. Quite apart from the alleged breaches of the Distributor Agreement, plaintiffs showed that defendants unlawfully acquired bone fixators through Biomet's European distributors and cooperative physicians. *See, e.g.*, PX-281; Tr. at 1100. Moreover, defendants purchased Orthofix bone fixators, often in small quantities, using third-party checks, in an attempt to deceive Orthofix as to the destination of the product. PX-285. Not only was Orthofix intentionally deceived, as by statements that EBIMS's inventory was "dangerously low," tr. at 978, but the products so acquired were thereafter marketed in direct competition with Orthofix, Inc. I conclude that such evidence is sufficient to allow a reasonable jury to decide that the defendants' conduct amounted to tortious interference with Orthofix's prospective economic advantage.

Defendants also contend that plaintiffs did not present evidence of damages flowing from the tortious interference, but solely presented evidence of damages from the alleged breach of contract. Because plaintiffs never claimed any distinct or additional compensatory damages arising from the torts, it is of little consequence that there are no separate damage calculations. Plaintiffs' expert testified to the entire amount of plaintiffs' damages. De-

fendants challenged that testimony upon cross-examination. I concluded, at trial, that requiring plaintiffs to itemize their damages as to each legal claim would be unnecessarily confusing to the jury and would risk a double, or even treble, recovery. The entire amount of damages plaintiffs sought for "lost profits" was presented to the jury and supported by expert testimony. Accordingly, there is sufficient evidence of plaintiffs' damages for tortious interference to support the jury's verdict, as there is for plaintiffs' contract damages.

2. In Pari Delicto *and "Unclean Hands"*

Defendants raise the twin doctrines of "unclean hands" and "*in pari delicto*" in support of their motion for judgment as a matter of law. It is an ancient maxim of equity that "he who comes into equity must come with clean hands." The "unclean hands" doctrine "embraces the principle that a court should not grant equitable relief to a party who is a wrongdoer with respect to the subject matter of the suit." *Pellitteri v. Pellitteri*, 266 N.J.Super. 56, 65, 628 A.2d 784 (App. Div. 1993) (citation omitted). Implementing the doctrine "calls for the exercise of careful and just discretion in denying remedies where a suitor is guilty of bad faith, fraud or unconscionable acts in the underlying transaction." *Id.* "The 'unclean hands' doctrine 'closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.'" *ABF Freight Sys., Inc. v. N.L.R.B.*, 510 U.S. 317, 329-30, 114 S.Ct. 835, 842, 127 L.Ed.2d 152 (1994) (Scalia, J., concurring) (quoting *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 997, 89 L.Ed. 1381 (1945)). The purpose of the doctrine is to protect the integrity of courts of

equity. Since defendants' motion seeks relief from the jury's verdict, and not from any award of injunctive relief, the "unclean hands" doctrine is not applicable in the circumstances. *See McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750, 756 n. 10 (3d Cir. 1990).

Given the scope of this motion, defendants more appropriately raise the doctrine of "*in pari delicto.*" This doctrine "derives from the Latin maxim, *in pari delicto potior est conditio defendentis,* which means: 'In a case of equal or mutual fault . . . the position of the party . . . [defending] is the better one.'" *McAdam*, 896 F.2d at 756 (quoting Black's Law Dictionary 711 (5th ed. 1979)). As the Third Circuit points out, "[u]nless the degrees of fault are essentially indistinguishable or the plaintiff's responsibility is clearly greater, the *in pari delicto* defense should not be allowed, and the plaintiff should be compensated." *Id.* (citing *Pinter v. Dahl*, 486 U.S. 622, 635, 108 S.Ct. 2063, 2072, 100 L.Ed.2d 658 (1988). New Jersey law is in accord with this interpretation of the doctrine. *See, e.g., Stella v. Dean Witter Reynolds, Inc.*, 241 N.J. Super. 55, 73, 574 A.2d 468 (App. Div. 1990) (The *in pari delicto* doctrine requires "at least substantially equal responsibility."). It is clear from the jury's verdict that it considered the plaintiffs comparatively innocent of wrongdoing. The jury both condemned the defendants' conduct through an award of punitive damages, and assessed a sizeable award of compensatory damages in favor of the plaintiffs compared with only a nominal award of damages to the defendants. On this record, the doctrine of *in pari delicto* simply does not apply.

3. Mutual Breach

Nor does the fact that the jury found both parties in breach of the contract prohibit an award of damages to the plaintiffs. At defendants' request, the court gave the following charge: "Under certain circumstances a material breach by one party may relieve the other party of its duty to continue to perform under the contract." Tr. at 5143-5144. Defendants raised no objection to the wording of the charge. Accordingly, defendants cannot now be heard to complain that any breach by Orthofix, material or otherwise, excused EBIMS's duty to perform under the Distributor Agreement. Fed. R.Civ.P. 51. Moreover, the cases cited by defendants do not stand for the proposition that *any* breach by one party to a contract excuses performance by the other, nor has this court's independent research uncovered any authority for such a broad proposition.

4. Irreconcilable Inconsistency in the Verdict

In further support of their twin contentions that a "mutual breach" precludes either party from recovering damages, and that such a mutual breach occurred in this case, defendants raised what they deem to be an inconsistency in the jury's verdict. Defendants assert that the jury must have found that EBIMS placed "excessive" orders in breach of the contract, yet the jury also found that Orthofix breached the contracts by failing to ship those "excessive" orders. Defendants' Brief at 14.

Plaintiffs contend that the defendants' failure to bring alleged inconsistencies in the verdict sheet to the court's attention, before the jury was discharged, effectively waived defendants' right to seek a new trial on this basis. Plaintiffs' Brief at 9-10. Whether or not the failure to raise this issue constitutes a waiver may depend on

whether the special verdict sheet in this case was governed by Rule 49(a)[1] or Rule 49(b)[2] of the Federal Rules of Civil Procedure.

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[1] Rule 49(a) provides:

> Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

[2] Rule 49(b) provides:

> General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are in-

The majority of circuits that have interpreted Rule 49(b) requires parties to object to alleged inconsistencies in the verdict before the jury is discharged. *See, e.g., Coralluzzo v. Education Mgmt. Corp.*, 86 F.3d at 185, 186 (11th Cir. 1996) (Challenges to the consistency of special verdicts "must be raised before the jury is excused" or they are waived.); *White v. Celotex*, 878 F.2d 144, 146 (4th Cir. 1989) (allowing the original deliberating body to reconcile inconsistencies prevents counsel from making an "end run" around Rule 49); *United States Football League v. National Football League*, 842 F.2d 1335, 1367 (2d Cir. 1988); *Strauss v. Stratojac Corp.*, 810 F.2d 679, 682-83 (7th Cir. 1987) (invocation of the waiver rule promotes the just and efficient operation of the federal courts); *Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd.*, 791 F.2d 1416, 1423 (10th Cir. 1986); *Merchant v. Ruhle*, 740 F.2d 86, 92 (1st Cir. 1984) (application of waiver rule prevents trial counsel from using "agreeable acquiescence to perceivable error as a weapon of appellate advocacy"); *Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984); *Fernandez v. Chardon*, 681 F.2d 42, 58 (1st Cir. 1982) (because counsel waited until after the jury was excused before raising a claim of inconsistency, defendants waived their right to have the general verdict set aside on that ground), *aff'd sub nom. Chardon v. Fumero Soto*, 462 U.S. 650, 103 S.Ct. 2611, 77 L.Ed.2d 74 (1983); *Stancill v. McKenzie Tank Lines, Inc.*, 497 F.2d 529, 534-35 (5th Cir. 1974) (same); *see also* 9A Charles A. Wright & Arthur R. Miller, *supra*, § 2513, at 226-27. At least one judge in the Third Circuit has opined that "it probably is necessary, as it is in the majority of the circuits, to raise prior

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consistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

to the jury's dismissal an objection based on the inconsistency of the answers to interrogatories supporting a general verdict rendered under Rule 49(b)." *Simmons v. City of Philadelphia,* 947 F.2d 1042, 1056-57 (3d Cir. 1991) (Becker, J., announcing the judgment of the court).

However, no such requirement applies to verdicts controlled by Rule 49(a). *Malley-Duff & Assoc. v. Crown Life Ins. Co.*, 734 F.2d 133, 145 (3d Cir. 1984). If such a verdict is inconsistent, the court may order a new trial regardless of whether the inconsistency was raised before the jury was excused. *Halprin v. Mora*, 231 F.2d 197, 201 (3d Cir. 1956) (cited in *Malley-Duff*, 734 F.2d at 145).

As the Third Circuit has observed, "in many cases, it is not entirely clear whether the verdict is governed by Fed.R.Civ.P. 49(a) or 49(b)." *Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 104 n. 16 (3d Cir. 1993). This is one such case, in which the jury was asked to make specific findings as to ultimate issues of fact as well as issues of evidentiary fact.[3] To the end that any confusion regarding the parties' obligations under Rule 49 might be dispelled, this court specifically invited counsel to object to the jury's verdict on the ground of inconsistency, before excusing the jury. Tr. at 5388. Counsel for the defendants lodged no objection at that time.

Fortunately, I need not decide whether defendants' waived the alleged inconsistencies in the verdict by failing to object before the jury was discharged. Defendants can-

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[3] According to one authority, however, the special verdict under Rule 49(a) is "typically used to divide the dispute into 'ultimate,' not actual facts." Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. Cin. L. Rev. 15, 85 (1990).

not obtain a new trial on this basis.[4] The standard for granting a new trial based upon inconsistencies in the jury's verdict has been explained by the Supreme Court as follows:

> Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment.

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798 (1962). Furthermore, "a verdict must be molded consistently with a jury's answers to special interrogatories when there is *any* view of the case which reconciles the various answers." *Bradford-White Corp. v. Ernst & Whinney*, 872 F.2d 1153, 1159 (3d Cir.) (emphasis added). Indeed, the Supreme Court has instructed that a court "must attempt to reconcile the jury's findings, *by exegesis if necessary*, . . ., before [it is] free to disregard the jury's special verdict and [order] a new trial." *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119, 83 S.Ct. 659, 666, 9 L.Ed.2d 618 (1963) (emphasis added).

This is a stringent standard. In this case, contrary to defendants' assertion, there clearly is a view of the case that makes the jury's answers to the special verdict sheet internally consistent, and consistent with the evidence presented at trial.

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[4] I note that defendants also seek judgment as a matter of law on this basis. A party cannot make a Rule 50(b) motion based upon inconsistencies in the jury's verdict. *Mosley v. Wilson*, 102 F.3d 85, 90 (3d Cir. 1996) (an inconsistent verdict could not have been raised in a motion for directed verdict prior to jury deliberations, therefore, it cannot support a post-trial motion for judgment as a matter of law).

The jury need not necessarily have found, as defendants argue, that Orthofix breached the Distributor Agreement by refusing to ship the "excessive" orders placed by EBIMS. Rather, the jury could have determined that Orthofix breached the Distributor Agreement by transmitting EBI's inventory worksheets to American Medical Electronics. The jury could also have concluded that Orthofix tortiously interfered with EBI when it diverted the May 1995 shipment in breach of its duty of good faith under the purchase order contracts. Neither of these views is at all inconsistent with the jury finding that EBIMS breached its duty of good faith under the Distributor Agreement by placing "excessive" orders. Defendants are not entitled to a new trial based upon alleged inconsistencies in the jury's verdict, much less are they entitled to judgment in their favor on this basis.

5. Federal Food and Drug Administration Regulations

Defendants assert that they were prejudiced by the admission of testimony regarding their alleged infractions of certain regulations of the federal Food and Drug Administration. Defendants' Brief at 33-34. Defendants seek a new trial on this bases. Because defendants failed to object on the basis of prejudice to any of the statements they now assert as grounds for a new trial, and because, to the extent there may have been any prejudice, defendants sought and obtained a curative jury instruction, the present assertion of prejudice is without merit.

At trial, defendants objected "to the relevance" of certain testimony concerning alleged violations of Food and Drug Administration regulations. Defendants' Brief at 34. Ultimately, the court refused plaintiffs' request that the court take judicial notice of these regulations, on the ground that no tort duty of care was established by law or FDA regulation. Tr. at 4769-4773. The court then

adopted, over the plaintiffs' objection, a curative instruction proposed by the defendants, which prohibited the jury from considering testimony regarding alleged FDA violations. Tr. at 5172. On May 23, 1997, when that jury charge was discussed and adopted by the court, counsel for the defendants expressed his opinion that the instruction "perfectly addresses the concern with FDA," Tr. at 4950. Defendants cannot now be heard to complain that the introduction of certain evidence of federal regulatory standards so severely prejudiced their case that a new trial must be ordered.

As to defendants' contentions that it was error to admit the testimony of plaintiffs' damages expert and certain hearsay testimony relating to confusion in the marketplace, they have been fully addressed in the record and I will not revisit them at this time. Tr. 4420-4421 (citing *Kraft Gen. Foods, Inc. v. BC-USA, Inc.*, 840 F.Supp. 344, 348 (E.D.Pa. 1993)). Suffice it to say that, even if it was error to admit certain hearsay testimony, which I concluded was admissible under the state of mind exception of Fed.R.Evid. 803(3), no infringement upon defendants' substantial rights resulted from the admission of this testimony. *See* Fed.R.Civ.P. 61.

6. Compensatory Damages Calculations

Defendants contend, as they have throughout this case, that Plaintiffs' damages testimony was inadequate, and that, without proper damages calculations in support of the plaintiffs' case, defendants should prevail as a matter of law. This argument was presented by defendants on their Rule 50 motion made at the close of plaintiffs' case, and again on their Rule 50 motion made at the close of all the evidence.

In short, defendants contend that the plaintiffs failed to present testimony separating the damages attributable to each entity and each claim. However, in the court's

view, no such testimony was required, inasmuch as Creighton Hoffman, plaintiffs' damages expert, testified that, whatever damages amounts could be calculated for Orthofix, Inc. and IMS, those amounts would be no greater than, and subsumed within the $95 million in lost profits which he calculated for Orthofix S.r.l. Tr. at 4580-4581. Because all of the claims upon which plaintiffs prevailed arose from the same set of facts surrounding the defendants' plan to convert the Orthofix external fixator market to the purchase of Dynafix, and because that plan succeeded, plaintiffs' lost profits need not be assigned to a given legal theory. Damages ordinarily flow from conduct, not from legal theories.

Plaintiffs cannot impugn the jury's verdict simply by asserting that the damages testimony was "undifferentiated." To have required separate damages figures for each Orthofix entity, when plaintiffs themselves admitted such calculations would be duplicative, would have invited confusion and a greater potential for an excessive or duplicative compensatory award. Plaintiffs tried this case on numerous alternative theories of liability each of which would support an award of "lost profits." To the extent the plaintiffs prevailed on any theory which was supported by sufficient evidence, they are entitled to the full measure of compensatory damages, and no more.

Defendants also assert that the damages calculations made by Orthofix's expert were speculative and excessive. Defendants' Brief at 24-25. This contention was first addressed by the court on motions *in limine*, and later, at trial, on Rule 50 motions. As defendants point out, Mr. Hoffman made certain assumptions, based upon AME's past performance and Orthofix's present European market share, among other things, in arriving at the $95 million damages amount to which he testified. The basis for these assumptions was provided in expert testimony from Ms. Sabatino. At the *in limine* stage, I determined that

plaintiffs' method of estimating damages, while it certainly yielded a large number, was not flawed as a matter of law. The jury could have rejected that testimony in its entirety. It did not.

Furthermore, testimony by defendants' economic expert, James Malackowski, cast doubt on Mr. Hoffman's lost profits calculations and the methodology he used to arrive at the figures to which he testified. It must be presumed that the jury carefully considered both Mr. Hoffman's testimony and Mr. Malackowski's testimony. Weighing the conflicting testimony of experts is a task for the jury. Here, the jury has considered the evidence and arrived at a figure between the two extremes offered by the experts. I am unwilling to "second guess" the result of the jury's deliberations.

7. Lost Profits

Defendants contend that "lost profits" were not within the contemplation of the parties at the time the Distributor Agreement was formed, and therefore "lost profits" cannot be the proper measure of damages for breach of contract in this case. This court rejected this contention when defendants first moved for judgment as a matter of law. Tr. at 1658. At that time, the court pointed out that, read as a whole, the Distributor Agreement required EBIMS to protect Orthofix's North American market share from invasion by competitors during the term of the contract. In other words, the Distributor Agreement, unless renewed, would return to Orthofix a substantial share of the U.S. market in external fixators. It follows logically that the economic impact arising from the loss of that market share, *i.e.*, lost profits, was foreseeable as damages for breach of the contract. Defendants' motion for judgment as a matter of law on this basis must be denied.

8. Over-ordering

As on their motion for judgment as a matter of law made at the close of plaintiffs' case, defendants contend that they are entitled to judgment as a matter of law "that EBI was entitled to sell all the products that Orthofix sold to it." Defendants' Brief at 25. I must confess to being somewhat mystified by this request, insofar as it is cast as one for judgment as a matter of law. As I understand defendants' argument, they contend that EBIMS was not contractually prevented from selling Orthofix products after the expiration of the Distributor Agreement. Similarly, the Distributor Agreement set no specific limits on the amount of products EBIMS could order. Thus, defendants argue, there was no breach of contract in merely ordering and selling Orthofix fixators. *Id.* Yet defendants recognize that, in part because the Distributor Agreement required EBIMS to report its inventory to Orthofix, the jury could have concluded that by "stockpiling" Orthofix products, while intentionally misleading Orthofix as to the size of EBIMS's inventory, defendants breached the implied duty of good faith contained in the contract.[5] *Id.*

Nevertheless, defendants argue that "over-ordering" cannot support plaintiffs' claims for tortious interference. Be that as it may, the "over-ordering," while an integral element of the scheme to secure additional Orthofix in-

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[5] This admission confounds the defendants' assertion, made in the preceding sentence, that Orthofix's sole remedy against over-ordering was a refusal to ship. Defendants' Brief at 25. New Jersey law, which by stipulation of the parties governed the measure of damages in this case, allows for the recovery of lost profits for breach of the duty of good faith and fair dealing when the contract foresees such damages. *See Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396, 425, 690 A.2d 575 (1997) ("[L]ost profits are an appropriate remedy when a buyer breaches the implied covenant of good faith and fair dealing.").

ventory in bad faith, was not the only evidence offered in support of plaintiffs' claims of tortious interference. Accordingly, the "judgment" which defendants seek would in no sense relieve them from the jury's verdict. Even if I were inclined to accept defendants' arguments, which I am not, I would decline to grant such ineffectual relief.

9. Breaches of the Distributor Agreement

Defendants contend that, even assuming EBIMS breached section 6(e) of the Distributor Agreement, which required EBIMS to supply Orthofix with periodic inventory reports, plaintiffs did not demonstrate any damages resulting from this breach. Defendants' Brief at 26. Whether or not plaintiffs' damages expert connected the breach of a single contractual provision with a fixed amount of damages is ultimately irrelevant. The jury heard testimony connecting this alleged breach with the defendants' successful attempt to secure sufficient inventory to squeeze Orthofix out of the U.S. market. Tr. at 2130. This is all that is required.

Defendants' also invite this court to revisit its ruling that section 6(d) of the Distributor Agreement, which provided that EBIMS would not "in any way handle" competitive external fixator products, also forbade EBIMS from developing such a product during the term of that agreement. Tr. at 135-143. For support, defendants primarily rely on arguments previously raised, all of which this court has already carefully considered and rejected. The only additional argument defendants offer in support of their contention that the court erred in its ruling is that this reading of the "in any way handle" clause "renders the agreement an unreasonable restraint of trade under U.S. antitrust law." Defendants' Brief at 30. This defense was never set forth in the Joint Final Pretrial

Order and so has been waived. *See* Fed. R. Civ. P. 16(e) (pretrial orders "shall control the subsequent course of the action"). In any event, defendants do not point to authority which would support the conclusion that the Distributor Agreement constituted an unreasonable covenant not to compete.

10. Defendants' Counterclaims

Defendants also move for judgment as a matter of law on their counterclaims under New Jersey's Franchise Practices Act, N.J. Stat. Ann. § 56:10-1 to 10-29, and for defamation and injurious falsehood. Defendants' Brief at 26-29. At the close of all the evidence, defendants moved for judgment as a matter of law on the following issues: (1) plaintiffs' claims based upon tortious interference with prospective economic relations; (2) Orthofix, S.r.l.'s claim for damages for breach of the distributor agreement; (3) plaintiffs' claim for lost profits; (4) plaintiffs' claim that defendants breached the distributor agreement through over-ordering; (5) plaintiffs' claim for punitive damages; (6) Orthofix, S.r.l.'s claim that EBIMS breached sections 6(e) and 6(l) of the distributor agreement; and, (7) plaintiffs' claim for unjust enrichment. Defendants have now renewed their motion for judgment as a matter of law as to most of these issues pursuant to Rule 50(b). By failing to move at trial for judgment as matter of law on their counterclaims, however, defendants have waived their right to seek judgment as a matter of law at this time.

In considering a renewed motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), this court may only review those grounds advanced by the moving party in its motions made at the close of plaintiffs' case and at the close of all the evidence. *Kutner*

Buick, Inc. v. American Motors Corp., 868 F.2d 614, 617 (3d Cir. 1989) (cited in the Advisory Committee Notes to 1991 Amendments to Rule 50(b); reversing district court's grant of judgment non *obstante veredicto* on grounds not advanced in the party's pre-verdict motions); *see also American and Foreign Ins. Co. v. Bolt*, 106 F.3d 155, 160 (6th Cir. 1997) (approving rule set forth in *Kutner Buick*); 9A Wright & Miller, *supra*, § 2537, at 345. Absent a timely preverdict motion, "judicial reexamination of the evidence abridges the plaintiff's Seventh Amendment right to a trial by jury." *Armstrong World Indus.*, 980 F.2d at 183.

Because, at trial, defendants failed to seek judgment as a matter of law on their counterclaims, it would be inappropriate for the court to reach these issues in a post-trial motion. However, it bears stating that, insofar as defendants seek a new trial on these grounds, they have utterly failed to show that any of their substantial rights have been adversely affected by any ruling on these issues. Fed.R.Civ.P. 61. Nor have defendants shown that the jury's verdict is against the weight of the evidence. Indeed, the jury's conclusion that the parties shared no "community of interest" within the meaning of that term under New Jersey's Franchise Practices Act is amply supported by evidence in the record. In view of the rapidity with which defendants converted their sales effort exclusively to the promotion of their own Dynafix external bone fixator, the jury could easily have concluded that no franchise-specific goodwill or product knowledge existed.

Similarly, the jury's findings on defendants' counterclaims for defamation and injurious falsehood are supported by evidence in the record. Orthofix asserted its privilege to make the statements of which defendants complained, and the jury could rationally have found that the

privilege applied under these circumstances, even if the statements were defamatory.

B. Punitive Damages

Having decided that defendants are not entitled to relief from the jury's findings on liability, or from its compensatory damages award, for any of the reasons advanced in this motion, I will now turn my attention to defendants' challenge to the punitive damages award. Defendants seek judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b) on plaintiffs' claim for punitive damages. Defendants present a number of reasons why they contend this court should set aside the jury's punitive damages award in its entirety.

1. Insufficient Evidence

Defendants first contend that they are entitled to judgment as a matter of law on plaintiffs' claim for punitive damages, because "no evidence was presented regarding malice, willfulness or wantonness." Defendants' Brief at 5. New Jersey's Punitive Damages Act requires proof by clear and convincing evidence of "actual malice" or "wanton and willful disregard" of persons who might be harmed by the defendant's acts or omissions. N.J. Stat. Ann. § 2A:15-5.12.

Defendants essentially do not dispute that, in an effort to maintain their dominant position in the United States market for external bone fixators, defendants launched a plan to secure a large inventory of Orthofix products. Defendants also cannot dispute that they concealed the magnitude and details of this effort from Orthofix.

Contrary to defendants' contentions, a rational jury could have concluded, as this one did, that at least some

of the acts taken by defendants in furtherance of this scheme were tortious, and that these acts were accompanied by a willful disregard of the plaintiffs' rights. For example, the jury heard evidence that James Pastena, EBI's President, told his sales force that EBI, rather than Orthofix, had decided not to renew the Distributor Agreement. PX-162; Tr. at 900-901. Defendants argue, as they did in support of their motion for judgment as a matter of law at the close of all the evidence,[6] that, whatever evidence of defendants' "lies" emerged at trial, there was no evidence that those lies were intended to harm the plaintiffs, and therefore the "lies" could not support a finding of actual malice, or wanton and reckless disregard. Tr. at 4663. As I understand their argument, defendants contend that Pastena lied to his sales force only in order to encourage them to remain at EBI, and to retain the competitive edge their services represented, but not to harm the plaintiffs. Tr. at 4667. On defendants' motion at the close of all the evidence, I concluded that defendants were asking the court "to weigh this evidence and to make determinations which . . . must be made by the jury. . . ." Tr. at 4668. It cannot be said as a matter of law that Pastena had only a benign motive for misleading his sales force. Consonant with the evidence presented at trial, the jury could reasonably have determined that Pastena had, at least, mixed motives for misleading the sales force.

Furthermore, Pastena's "lies" to the EBI sales force form only one portion of the evidence of tortious conduct presented in support of punitive damages. The jury considered evidence from which it could have concluded that Pastena intended the sales force to repeat the "lie" to doctors and hospitals served by EBI, after the Distributor

[6] This motion was argued on May 22, 1997. Tr. at 4663-4668.

Agreement ended, in an effort to isolate Orthofix and capture the U.S. market for external fixators for EBI. PX-284 (instructing sales representatives to explain that EBI chose not to renew its exclusive distributorship because it felt that Orthofix "did not address the needs of U.S. surgeons" and "were woefully slow to respond").

Moreover, the jury heard, and apparently credited, testimony that Pastena claimed he would "destroy Orthofix." Tr. at 680. Whether or not Pastena ever denied saying such a thing, Tr. at 4664, is immaterial to a Rule 50 motion. Credibility determinations are strictly for the jury. The jury also heard evidence that, on several occasions, EBIMS intentionally deceived Orthofix regarding its level of inventory in order to secure "sufficient" Orthofix products. PX-116; Tr. at 978.

Defendants separately contend that, even assuming, *arguendo*, there was evidence presented at trial of tortious acts amounting to "actual malice," Biomet cannot be liable for punitive damages because none of the acts "was committed by or at the direction of Biomet employees." Defendants' Brief at 5. While Pastena and EBIMS provided perhaps the most vivid evidence of an intent to harm plaintiffs, the jury also considered evidence from which it could have concluded that, acting in concert with the other defendants, Biomet induced one of its European distributors, Ortomed, to purchase Orthofix products on behalf of Biomet and conceal from Orthofix the actual purchaser and destination of the products. Defendants argue that the active concealment, in this instance, was committed by a non-party, Ortomed. However, drawing every reasonable inference in favor of the verdict winner, as I must, *see Bohus v. Beloff*, 950 F.2d 919, 923 (3d Cir. 1991) (internal citations omitted), this evidence supports a finding that Biomet instigated the concealment as

part of a deliberate plan to deceive Orthofix regarding EBIMS's inventory.

2. Breach of Contract

Defendants also argue that the punitive damages award should be set aside because the jury impermissibly awarded punitive damages for breach of contract. Defendants' Brief at 7. The jury was instructed that punitive damages could not be awarded for breach of contract under New Jersey law. The jury was first instructed as follows regarding compensatory and punitive damages: "I will instruct you as to which kinds of damages you may consider for each claim." Tr. at 5171. The jury was then instructed that "[p]unitive damages are not available under the Lanham Act, New Jersey's Franchise Practices Act, or for breach of contract alone. For those claims, you should only consider compensatory damages." Tr. at 5197. Subsequently, the jury was reminded that:

> If you award Orthofix compensatory damages on one or more of its claims for tortious intereference with prospective economic advantage, tortious interference with existing contractual relationships, defamation, or common law unfair competition, then you may award punitive damages to Orthofix. Similarly, if you award EBI compensatory damages on one or more of their counterclaims for tortious interference with purchase order contracts, tortious interference with existing contractual relationships, or defamation, you may award punitive damages to EBI.

Tr. at 5203. Finally, the structure of the special interrogatories propounded to the jury did not invite an answer to any question regarding punitive damages, unless liability for some tortious act was first established and com-

pensatory damages awarded for that act. Special Verdict Sheet at 5.

In reviewing a jury verdict, it is proper to "assume that the jury understood and followed the court's instructions." *Loughman*, 6 F.3d at 105. Defendants' argument that the jury assessed punitive damages for breach of contract its without merit, inasmuch it requires this court to assume that the jury disobeyed its instructions.

3. Constitutionality of the Punitive Damages Award

Defendants assail the jury's punitive damages award as unconstitutional. Only when an award of punitive damages is "grossly excessive," and therefore arbitrary, does it violate the Fourteenth Amendment. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). This court's inquiry into whether the punitive damages award in this case is "grossly excessive" must begin with an analysis of the goals such an award is intended to promote *BMW of N. Am., Inc. v. Gore*, —— U.S. ——, ——, 116 S.Ct. 1589, 1595, 134 L.Ed.2d 809 (1996). In *Gore*, BMW had adopted a nationwide policy, apparently within the relevant statutory guidelines adopted in most states, regarding disclosure to new car purchasers of minor pre-sale repairs. *Id.*, —— U.S. at ——, 116 S.Ct. at 1593. At trial, the jury determined that BMW's failure to disclose a pre-sale repair to the plaintiff's automobile constituted common-law fraud, awarding $4000.00 in compensatory damages and $4 million in punitive damages.[7] Before the Supreme Court, Dr. Gore argued that the large amount of punitive damages was necessary to alter the defendant's nationwide policy. *Id.*, —— U.S. at ——,

[7] On direct appeal, the Alabama Supreme Court remitted the $4 million figure to $2 million.

116 S.Ct. at 1597. The Court concluded that such a rationale for punitive damages encroached upon permissible legislative and judicial policy choices in other states. *Id.* There has been no similar attempt in this case to justify this award on any "extraterritorial" rationale.

In New Jersey, the purpose of an award of punitive damages is "to punish the defendant and to deter that defendant from repeating such conduct." N.J. Stat. Ann. § 2A:15-5.14; *see also* New Jersey Assembly, Insurance Comm. Statement, Senate No. 1496-L.1995, ch. 142, *reprinted in* N.J. Stat. Ann. § 2A:15-5.9, at 47 (West Supp. 1997). Therefore, the degree of reprehensibility of the defendant's conduct is critical to the analysis of whether punitive damages will serve their intended purpose in any given case. In *Gore*, the Supreme Court was particularly concerned that the trial had produced no evidence of the defendant's bad faith, or that the defendant persisted in any unlawful course of action. *Gore*, —— U.S. at ——, 116 S.Ct. at 1601. While such evidence may not be abundant in this case, it is not, as in *Gore*, totally absent. While defendants are correct in stating that the record reflects "no loss of life, serious health hazard, or major environmental harm" resulting from their conduct, the jury heard evidence that, on at least one occasion, an anaesthetized patient was "inconvenienced," when defendants' substituted a different ankle clamp for the Orthofix model which was routinely purchased by the hospital. Tr. at 1537-1538; 1559-1560.

While the Supreme Court has consistently refused to draw any mathematical line for excessiveness, the ratio of the punitive award to the compensatory award is normally considered an important factor. *See Gore*, —— U.S. at ——, 116 S.Ct. at 603 ("When the ratio is . . . breathtaking . . . the award must surely 'raise a suspicious judicial eyebrow.' ") (citing *TXO Prod.*, 509 U.S. at 482,

113 S.Ct. at 2733-32 (O'Connor, J., dissenting)). As *Gore* came to the Supreme Court, the punitive award was 500 times the amount of compensatory damages. In this case, the ratio is closer to two to one. Moreover, where the potential harm from the tortious conduct far exceeds the actual harm, it may be appropriate in certain cases to consider the ratio of the punitive award to the threatened harm when reviewing the constitutionality of a punitive damages award. *See TXO Production*, 509 U.S. at 462, 113 S.Ct. at 2722-23.[8] In sum, there is nothing about the ratio of the punitive damages to the compensatory damages in this case that "jar[s] one's constitutional sensibilities." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18, 111 S.Ct. 1032, 1043, 113 L.Ed.2d 1 (1991). Accordingly, I conclude that the jury's award of punitive damages in this case does not run afoul of the Constitution.

4. Defendants' Individual Liability for Punitive Damages

Defendants draw the court's attention to N.J. Stat. Ann. § 2A:15-5.13(e), which requires that: "In any action in which there are two or more defendants, an award of punitive damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant." In other words,

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[8] Although potential, rather than actual economic loss may be a factor in determining whether the punitive damages award passes constitutional muster, New Jersey's Punitive Damages Act requires the jury, in setting the amount of an award of punitive damages, to consider the "profitability of the misconduct to the defendant." The Act does not invite juries to speculate about the "potential profitability" of that misconduct, notwithstanding plaintiffs' attractive arguments to the contrary. *See* Plaintiffs' Brief at 36.

New Jersey's Punitive Damages Act has abolished joint and several liability for punitive damages.

Defendants challenge the punitive damages award in this case on the ground that it is not properly apportioned among EBI, EBIMS and Biomet, but instead, presumably runs against all three entities.[9] Because defendants raised no objection to the question on the verdict sheet which requested a single punitive damages award against all defendants. I conclude that they have waived any objection to the amount of the award on this basis. *See* Special Verdict Sheet at 6, question 23.

During the course of the trial, defendants' filed several versions of their Proposed Requests to Charge, each of which contained the following instruction on punitive damages, or one very similar to it: "The punitive damage award must be specific as to any defendant you find liable. The evidence pertaining to one defendant may be irrelevant to other EBI [sic]. Each defendant is liable only for the amount of the award against that defendant." EBI/Biomet Request No. 79, dated May 23, 1997.[10] Except for the second sentence, the language fairly tracks New Jersey's Punitive Damages Act as set forth above. N.J. Stat. Ann. § 2A:15-5.13(e). With the added sentence removed, and the word "defendant" changed to

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[9] Defendants argue that the entire punitive damages award must be "set aside" under this rule "as a matter of law." Defendants' Brief at 10. This objection, if well taken, would only entitle defendants to a new trial on the issue of punitive damages, because the error goes to the instructions to the jury. Accordingly, I will evaluate this contention under the standard for motions for a new trial, rather than as a motion for judgment as a matter of law.

[10] I have quoted from the defendants' final submission, dated May 23, 1997, in which the parties set forth a "joint" request, and each set forth separately those requests about which they disagreed. As noted, this quote is taken from defendants' submission, denoting that it was not agreed upon by plaintiffs.

"offending party," to reflect that both parties had claims for punitive damages, the charge read: "The punitive damage award must be specific as to any offending party you find liable. Each offending party is liable only for the amount of the award against that party." This is the charge that was given. Tr. at 5205.

Notwithstanding the specificity required by the charge, the verdict sheet, as it was submitted to the jury, contained only one question regarding the amount of punitive damages and a single line to be completed by the foreperson.[11] Notably, defendants' proposed verdict sheet, in each of its several manifestations, contained essentially the same single question regarding the amount of punitive damages and a single line for the jury to complete.[12] Not surprisingly, plaintiffs' proposed verdict sheet, which ran to a mere six pages, also contained only a single question regarding the amount of punitive damages and a single

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[11] If the jury was satisfied that an award of punitive damages in favor of Orthofix was appropriate, they were asked:

> What amount of punitive damages, if any, do you award to Orthofix?
>
> $_____

Special Verdict Sheet, Question 23. *See* Tr. at 5382.

[12] For example, defendants' final Revised Verdict Sheet, dated May 27, 1997, which runs to sixty-two pages, asks:

> Finding (check only one)
>
> —— We, the jury, find for EBI on Orthofix's claim for punitive damages.
>
> —— We, the jury, find for Orthofix on Orthofix's claim for punitive damages.
>
> If you entered a finding in favor of Orthofix on its claim for punitive damages, please set forth below your determination of the amount of those punitive damages.
>
> Punitive damages $_____

blank line.[13] Thus, the structural flaw in the verdict sheet, which permitted the jury to enter an award of punitive damages without specifying against which defendant it should run, was not merely acquiesced to by the defendants, it was, at least in part, their own creation.

Rule 51 of the Federal Rules of Civil Procedure provides that "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed.R.Civ.P. 51. Failure to object to interrogatories can be equally fatal. *See Dubrow v. Taglianetti*, Civ. Action No. 94-4995, 1996 WL 750056, at *7 (E.D. Pa. Dec. 30, 1996) (defendant failed to object to interrogatories on the basis of lack of itemization of damages, and so waived objection); *see also McCarthy v. Silver Bulk Shipping Ltd.*, 487 F.Supp. 1021, 1032 (E.D. Pa. 1980) ("Defendant did not note his objections on this issue either during the framing and presenting of the interrogatories to the jury or in response to the charge, and has therefore waived his objection.").

Notwithstanding a party's failure to object under Rule 51, this court may still grant a new trial on this basis if "the error is fundamental and highly prejudicial." *Wagner v. Firestone Tire & Rubber Co.*, 890 F.2d 652, 658 (3d Cir. 1989) (internal citations omitted). In order to merit review under this judicially created exception to the waiver rule, the error must be such that the failure to consider it would result in a "miscarriage of justice."

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[13] Plaintiffs' requested verdict sheet, in pertinent part, asked the following:

> [I]f you determine that EBI/Biomet are liable for punitive damages, state the amount of punitive damages that you award:
>
> $_____

Beardshall v. Minuteman Press Int'l Inc., 664 F.2d 23, 27 (3d Cir. 1981) (quoting *United States v. 564.54 Acres of Land*, 576 F.2d 983, 987 (3d Cir. 1978), *rev'd on other grounds*, 441 U.S. 506, 99 S.Ct. 1854, 60 L.Ed.2d 435 (1979)). Unless courts exercise their discretion sparingly to review errors in jury instructions which were not objected to at trial, they risk weakening the important policies served by Rule 51. *See McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750, 769 n. 29 (3d Cir. 1990). On this record, it cannot be said that the jury's failure to allocate its punitive damages award among the defendants resulted in manifest injustice.

This is not a situation in which the error clearly allowed the jury to mistake the burden of proof. *See Ratay v. Lincoln Nat'l Life Ins. Co.*, 378 F.2d 209 (3d Cir. 1967) (holding that the trial court's charge that fraud must be proved only by a preponderance of the evidence was fundamental error). Nor is this a case in which the jury may have awarded greater damages than were legally compensable. *See Bereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 53 (3d Cir. 1989). On the contrary, the jury in this case necessarily evaluated the tortious conduct of all three defendants before arriving at a conclusion regarding punitive damages. Moreover, the jury was properly instructed on the relevant law. The fact that the Special Verdict Sheet invited a "lump sum" award, rather than reflecting a separate amount of punitive damages against each defendant, was a product of the parties' oversight in drafting the verdict sheet, but was not the kind of error that left the jury "without adequate guidance on a fundamental question." *565.54 Acres of Land*, 576 F.2d at 987. Indeed, the jury's failure to question the apparent discrepancy between the instruction on punitive damages and the form of the verdict sheet can, at least

in part, be attributed to the defendants' own trial strategy. Defendants never argued to the jury that one corporate entity, *e.g.* Biomet, was less culpable than another. Therefore, it cannot now be said that the form of the verdict sheet so affected Biomet's substantial rights that a new trial is merited on that basis. That said, the amount of the jury's award of punitive damages remains troubling, in light of the entire record.

5. *Review Under New Jersey's Punitive Damages Act*

New Jersey's Punitive Damages Act requires this court to review the jury's award of punitive damages in this case. This review, conducted under the legal standard mandated in the Act, forms a part of the substantive law of New Jersey, whose law provided the rule of decision on plaintiffs' tort damages.[14] Therefore, the Act must be applied in considering a motion for a new trial or remittitur, as long as this court "can give effect to the substantive thrust of [the Act] without untoward alteration of the federal scheme for the trial and decision of civil cases." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. ——, ——, 116 S.Ct.. 2211, 2219, 135 L.Ed.2d 659 (1996).

The Punitive Damages Act requires that:

> Before entering judgment for an award of punitive damages, the trial judge shall ascertain that the award is reasonable in its amount and justified in the

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[14] In most cases, the review mandated by New Jersey's Punitive Damages Act would undoubtedly "have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court." *Hanna v. Plumer*, 380 U.S. 460, 468 n. 9, 85 S.Ct. 1136, 1142 n. 9, 14 L.Ed.2d 8 (1965).

> circumstances of the case, in light of the purpose to punish the defendant and to deter that defendant from repeating such conduct. If necessary to satisfy the requirements of this section, the judge may reduce the amount of or eliminate the award of punitive damages.

N.J. Stat. Ann. § 2A:15-5.14(a).[15] In *Gasperini*, the Supreme Court considered a New York statute which established that the amount of a jury verdict would be "excessive or inadequate" if the award "deviates materially from what would be reasonable compensation" *Gasperini*, —— U.S. at —— & n. 4, 116 S.Ct. at 2217 & n. 4. The Court observed that the New York legislature thereby required greater judicial scrutiny of jury awards than had existed under the common law "shocks the conscience" test. *Id.*, —— U.S. ——-——, 116 S.Ct. at 2217-18. Similarly, when the New Jersey legislature enacted punitive damages reform, it specified that such awards must be "reasonable" and "justified in the circumstances." This standard, like the New York standard discussed in *Gasperini*, is a clear departure from the common law "shocks the conscience" test. *See, e.g., Taweel v. Starn's Shoprite Supermarket*, 58 N.J. 227, 236, 276 A.2d 861 (1971) (jury's assessment of damages should not be overturned unless so disproportionate as to shock the conscience of the court).[16]

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[15] Whether the review is undertaken before judgment is entered, or, as here, on a timely Rule 59 motion, is a matter of procedure, not substantive state law. *See Gasperini*, —— U.S. at ——-——, 116 S.Ct. at 2221-25 (New York statute's substantive direction to the state's Appellate Division could be applied by the federal district court, in the first instance, on a Rule 59 motion).

[16] For the same reason, I am convinced that an award may be so large that it will not survive the review mandated under New Jersey's Punitive Damages Act, although the award is not unconstitutional.

Because the Punitive Damages Act took effect relatively recently, October 27, 1995, there are no reported New Jersey cases defining the proper scope of the "reasonable and justified" standard of review.[17] Moreover, there are no comparable cases in which similar amounts of punitive damages have been either upheld or reduced under § 2A:15-5.14(a). *See Delli Santi v. CNA Ins. Cos.*, 88 F.3d 192, 206 (3d Cir. 1996) (In deciding the propriety of an order of remittitur, "a review of jury verdicts in other cases may prove helpful, though not mandatory."); *Dunn v. HOVIC*, 1 F.3d 1371, 1391 (3d Cir. 1993) (After the district court had ordered remittitur of the punitive damages award from $25 million to $2 million, the Third Circuit, upon reviewing jury verdicts in similar cases, ordered a further remittitur of the punitive damages to $1 million, "the maximum amount that could reasonably have been awarded in this case."), *modified on other grounds*, 13 F.3d 58 (3d Cir. 1993).[18] Although there are similar laws in other states, *see, e.g.*, Miss Stat.

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[17] This case was filed on November 29, 1995.

[18] While it is appealing to compare awards in similar cases, I bear in mind that the jury system naturally produces inconsistent awards. As Justice Anthony Kennedy has pointed out, some inconsistency in jury results can be expected for at least two reasons:

> First, the jury is empaneled to act as a decisionmaker in a single case, not as a more permanent body. As a necessary consequence of this case-to-case existence, juries may tend to reach disparate outcomes based on the same instructions. Second, the generality of the instructions may contribute to a certain lack of predictabilty. The law encompasses standards phrased at varying levels of generality. As with other adjudicators, the jury may be instructed to follow a rule of certain and specific content . . . or . . . the standard can be more abstract and general to give the adjudicator flexibilty in resolving the dispute at hand.

Haslip, 499 U.S. at 40, 111 S.Ct. at 1055 (Kennedy, J., concurring).

§ 11-1-65(f)(i) (effective July 1, 1993),[19] a survey of the case law in other jurisdictions reveals no cases interpreting a "reasonableness" standard similar to the one set forth in the New Jersey statute.

In assessing whether the amount of an award of punitive damages is reasonable, I begin with the same factors the jury considered in setting the amount of that award: (1) the likelihood of serious harm resulting from defendants' misconduct; (2) the defendants' awareness or reckless disregard of that likelihood; (3) the conduct of the defendants upon learning that their initial misconduct would likely cause harm; (4) the duration of the misconduct or any concealment of the misconduct by the defendant; (5) the profitability of the misconduct; (6) when the misconduct was teminated; and (7) the defendant's financial condition. *See* Tr. at 5205; N.J. Stat. Ann. § 2A:15-5-512. It is also appropriate to consider the nature and extent of the harm done. *See* Restatement (Second) of Torts § 908, cmt. e.

In this case, defendants devised and undertook a plan to deprive Orthofix of the good will and product recognition which existed for Orthofix bone fixators. This plan was largely successful, and defendants were able to secure a large part of the external bone fixator market for the Dynafix product which they produce. The jury concluded that this plan involved acts of deception and, at least, reckless disregard of the consequences to Orthofix. Nor is there evidence in the record that defendants ceased their misconduct upon learning of the harm to Orthofix,

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[19] This subsection provides: "Before entering judgment for an award of punitive damages the trial court shall ascertain that the award is reasonable in its amount and rationally related to the purpose to punish what occurred giving rise to the award and to deter its repetition by the defendant and others." Miss. Code Ann. § 11-1-65(1)(f)(i).

or attempted to correct its harmful effects. Indeed, there is evidence of concealment of the misconduct. All of these factors support an award of punitive damages.

In setting the amount of this award of punitive damages, the jury was instructed to consider the profitability of the defendants' misconduct, its duration and the wealth of the defendants. Plaintiffs presented evidence that, by securing for themselves the market in bone fixators which had previously been Orthofix's, the defendants profited by "approximately 97 million dollars." Tr. at 1280. Moreover, there was no evidence that defendants terminated the plan to deprive Orthofix of this market before that plan achieved its purpose. These factors too might justify a substantial award of punitive damages.

I am convinced, however, that the jury departed from a reasonable award in considering the wealth of the defendants. There was no testimony or evidence presented as to the net worth of EBI or EBIMS. The evidence of Biomet's fiscal 1996 cash-on-hand, $106,000,000.00, corresponds closely with the amount of punitive damages awarded by the jury in this case, $100,600,000.00. There was evidence presented at trial that EBI and EBIMS represented only a portion of the total assets of Biomet. I therefore conclude that, although properly considering the conduct of all three defendants in setting the amount of punitive damages, the jury gave too much weight to the net worth of only one defendant, by far the largest, Biomet. In so doing, the jury arrived at an amount that is not reasonable given the relative size of EBI and EBIMS.

Furthermore, the nature of the harm and its potential for repetition are important factors in determining the amount of an award of punitive damages. As part of this court's duty to review the award of punitive damages in

this case, "in light of the purpose to punish the defendant[s] and deter th[ose] defendant[s] from repeating such conduct," it is also appropriate to weigh the likelihood of repetition of the conduct at issue in this case.

In *Brink's Inc. v. City of New York*, the district court remitted a jury award of punitive damages in the amount of $5,000,000 to $1,500,000, because the threat of similar injury to others was minimal, and because there was little likelihood of a recurrence, and the injury, even assuming repetition, was loss of money "not death or severe personal injury." *Brink's v. City of New York*, 546 F. Supp. 403, 413-14 (1982). Here too, there seems to be little chance of a recurrence of the conduct at issue in this case. Defendants took advantage of an exclusive relationship with Orthofix in order to harm Orthofix and capture the external bone fixator market in the United States for themselves. No evidence emerged at trial which could have convinced the jury that this circumstance, or a substantially similar one, was likely to arise again in the future. On the contrary, the evidence points to a unique relationship between plaintiffs and defendants, which went uniquely wrong. This fact undercuts the need for a deterrent on the order of $100,600,000.00.

Moreover, much as plaintiffs argue that defendants' conduct created a serious threat to public health, the evidence of such a threat did not emerge at trial. Certainly, there was testimony concerning the incident in which an anaesthetized patient was kept waiting for an ankle clamp. However, the surgeon, in that instance, apparently used the substituted ankle clamp without difficulty. Tr. at 1559. There was also testimony, from Mr. Edgar Wallner, President and CEO of the Orthofix Group, to his understanding that there had been "a problem" using a non-orthofix ankle clamp with Orthofix components. Tr. at

643. Furthermore, although Mr. Wallner testified that the non-orthofix ankle clamp differed "biomechanically" from the Orthofix clamp, tr, at 645, plaintiffs can point to no evidence that it was unsafe. Plaintiffs' Brief at 31-32. In support of their argument that the jury's punitive damage award is reasonably related to the harm caused by defendants' conduct, plaintiffs contend that the greater the magnitude of the hazard to the public, the greater the need to deter such conduct. *Id.* at 33 (citing David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258, 1316 (1976)). This maxim may be especially applicable to a products liability case. However, it would be a mistake to equate the purely economic harm to Orthofix in this case with the harm to an unsuspecting public which arises from a faulty product. It simply was never shown that the external bone fixators developed by Biomet represented a hazard to the public. Similarly, although plaintiffs introduced a warning letter that EBIMS received from the FDA, the testimony never established the seriousness of the reported violations, or the potential harm to patients, if any, arising from those violations.

At bottom, this case, like *Brink's*, is about the collapse of a contractual relationship. As the *Brink's* court pointed out, contracts usually concern private rights, not public rights. *Brink's*, 546 F. Supp. at 413. In light of their limited purpose, punitive damages ought to play a much more circumscribed role in enforcing private rights.

Plaintiffs contend that the $100,600,000.00 award of punitive damages is "reasonable," because it is well within the statutory cap on punitive damages, five times the compensatory damages. *See* N.J. Stat. Ann. § 2A:15-5.14(b). While the ratio of the punitive damages award in this case to the compensatory damages is only 2.1:1,

the ratio alone is of little assistance. As plaintiffs must realize "it is elementary that [the court] must construe a statute so as to give effect to every word." *Scheidemann v. I.N.S.*, 83 F.3d 1517, 1524 (3d Cir. 1996); *see also United States v. Alaska*, —— U.S. ——, ——, 117 S.Ct. 1888, 1918, 138 L.Ed.2d 231 (1997) ("The Court will avoid an interpretation of a statute that 'renders some words altogether redundant.'") (quoting *Gustafson v. Alloyd Company, Inc.*, 513 U.S. 561, 574, 115 S.Ct. 1061, 1069, 131 L.Ed.2d 1 (1995)). If everything beneath the cap is automatically "reasonable," and no defendant is liable for any amount in excess of the cap, then the legislature need not have mandated judicial review of punitive damages awards for "reasonableness." In short, by plaintiffs' reasoning, subsection 5.14(b) of New Jersey's Punitive Damages Act would make a nullity out of a specific requirement of subsection 5.14(a). *See United States v. LaBonte*, —— U.S. ——, ——, 117 S.Ct. 1673, 1678, 137 L.Ed.2d 1001 (1997) (refusing to read one section of a statute as "essentially rendering meaningless entire provisions of other statutes").

Moreover, while the ratio of punitive damages to compensatory damages in this case is relatively small, 2.1:1, the resulting amount of punitive damages is large, $100,600,000.00. The New Jersey cases plaintiffs cite in which even greater ratios have been upheld, all involved much smaller actual awards. In *Leimgruber v. Claridge Assoc., Ltd.*, 73 N.J. 450, 375 A.2d 652 (1977), a ratio of 9.7:1 was upheld, but the compensatory damages were only $1,700, and the punitive damages only $16,500. *See also Velop, Inc. v. Kaplan*, 301 N.J. Super. 32, 70, 693 A.2d 917 (App. Div. 1997) (upholding punitive damages awards of $300,000 against each of two defendants whose share of the compensatory award was $35,670.60 each); *Almog v. Israel Travel Advisory Serv.*,

Inc., 298 N.J. Super. 145 161-62, 689 A.2d 158 (App. Div. 1997) (upholding punitive damages award of $4,500,000 against compensatory damages of $1,324,-000); *see also Levinson v. Prentice-Hall, Inc.*, 868 F.2d 558, 565 (3d Cir. 1989).

The Supreme Court of New Jersey has recognized that "[t]he reasonableness of the relationship of punitive damages to actual injury must be considered in light of other factors in each case." *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 673, 512 A.2d 466 (1986). As that court noted, "particularly egregious conduct may generate only minimal compensatory damages." *Id.* When that happens, "higher punitive damages would be justified than when substantial compensatory damages are awarded." *Id.* Therefore, one naturally expects a much lower ratio when a substantial award of compensatory damages has been made. *Cf. Gore*, —— U.S. at ——, 116 S.Ct. at 1602 ("low awards of compensatory damages may properly support a higher ratio than high compensatory awards").

In light of the entire record, and in view of the factors which must be considered under New Jersey law in setting the amount of a punitive damages award, I conclude that the maximum amount of punitive damages a jury could award, which would be reasonable and justified in these circumstances, would be fifty million dollars, and I will order a remittitur to that amount.[20]

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[20] This disposition fully addresses the defendants' contention, made elsewhere in its brief, that the amount of punitive damages is against the weight of the evidence, warranting a new trial or remittitur. However, I add that I find no merit in defendants' contention that plaintiffs never "split out" the damages arising from their separate claims and never identified which conduct gave rise to which claims. The jury could properly consider "the profitability of the misconduct," without such a demonstration. Plaintiffs put on evidence of the profitability to the defendants of the U.S. market in external fixators, that is, the profitability of defendants'

A district court that finds the amount of an award of damages to be excessive cannot merely order a reduction in the award. *See* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *supra*, § 2815. The court can, however, order a new trial limited to the issue of damages, or condition the denial of a new trial on plaintiff's acceptance of the reduced damage award. *Id.; see also Spence v. Board of Educ.*, 806 F.2d 1198, 1201 (3d Cir. 1986). Remittitur, therefore, offers the plaintiff a choice between a reduced award of damages and a new trial. Accordingly, plaintiffs will be afforded twenty (20) days from the date of this opinion and order to inform the defendants, in writing of their decision, and to file with the court an Amended Judgment indicating their acceptance of the remittitur, or a new trial, limited to the issue of punitive damages, will be scheduled.

IV. Conclusion

For the foregoing reasons, defendants' renewed motion for judgment as a matter of law will be denied. Because the jury's award of punitive damages in this case is not reasonable and justified in the circumstances, I will order the plaintiffs to file a remittitur of the amount of the punitive damages award in excess of $50 million, if they wish to avoid a new trial on the issue of punitive damages.

Defendants' Rule 62(b) Motion for a Stay Without Bond during the pendency of these post-trial motions, which is returnable September 5, 1997, will be dismissed as moot. This court will enter appropriate order.

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entire "scheme to supplant Orthofix as a leading provider of external bone fixators. New Jersey's Punitive Damages Act requires no more. It must be assumed that the jury properly weighed this factor.

ORDER

This matter having come before the Court on Defendants' Motion for Judgment as a Matter of Law pursuant to Fed.R.Civ.P. 50(b), and upon Defendants' Alternative Motion for a New Trial or Remittitur pursuant to Fed.R.Civ.P. 59, and upon Defendants' Motion for a Stay Without Bond pursuant to Fed.R.Civ.P. 62(b), Dennis P. Orr, Esq., of Mayer, Brown & Platt, and Stephen J. Marzen, Esq., of Shearman & Sterling, and Joel Schneider, Esq., of Archer & Greiner, appearing on behalf of the plaintiffs/counterclaim-defendants, Orthofix, S.r.l., Orthofix, Inc., and Inter Medical Supplies, Limited, and James J. Ferrelli, Esq., of Duane, Morris & Heckscher, and Arthur P. Kallares, Esq., and Thomas E. Mixdorf, Esq., of Ice, Miller, Donadio & Ryan, appearing on behalf of the defendants/counterclaimants, EBI Medical Systems, Inc., Electro-Biology, Inc., and Biomet, Inc., and,

The Court having considered the motion and the briefs and exhibits filed in support of and in opposition to this motion, for the reasons set forth in this Court's OPINION filed concurrently with this ORDER:

It is, on this 28th day of August 1997, ORDERED that Defendants' Motion for Judgment as a Matter of Law pursuant to Fed.R.Civ.P. 50(b) is DENIED; and,

It is further ORDERED that Defendants' Motion for a New Trial as to punitive damages is conditionally granted, unless Plaintiffs shall, within twenty (20) days of the date of this ORDER, file with this Court an Amended Judgment reflecting their acceptance of a remittitur of the amount of the jury's award of punitive damages in excess of fifty million dollars ($50,000,000.00); and,

It is further ORDERED that Defendants' Motion for a Stay Without Bond pursuant to Fed.R.Civ.P. 62(b) is DISMISSED AS MOOT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-5158

INTER MEDICAL SUPPLIES, LTD.

v.

EBI MEDICAL SYSTEMS, INC.;
ELECTRO-BIOLOGY, INC.;
BIOMET, INC.

v.

ORTHOFIX, LTD.
ORTHOFIX INTERNATIONAL, N.V.

(D.C. Civil No. 95-06035)

ORTHOFIX, INC.;
ORTHOFIX S.R.L.

v.

EBI MEDICAL SYSTEMS, INC.;
ELECTRO-BIOLOGY, INC.;
BIOMET, INC.

(D.C. Civil No. 96-01047)

EBI MEDICAL SYSTEMS, INC.;
ELECTRO-BIOLOGY, INC.;
BIOMET, INC.,

Appellants

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, GARTH*, and MAGILL**, *Circuit Judges*

The petition for rehearing filed by Defendants-Appellants, EBI Medical Systems, Inc., Electro-Biology, Inc., and Biomet, Inc., in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: Jul. 23, 1999

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* Hon. Leonard I. Garth as to panel rehearing only.

** Hon. Frank J. Magill, United States Court of Appeals for the Eighth Circuit, sitting by designation, as to panel rehearing only.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-5158

INTER MEDICAL SUPPLIES, LTD.

v.

EBI MEDICAL SYSTEMS, INC.;
ELECTRO-BIOLOGY, INC.;
BIOMET, INC.

v.

ORTHOFIX, LTD.
ORTHOFIX INTERNATIONAL, N.V.

(D.C. Civil No. 95-06035)

ORTHOFIX, INC.;
ORTHOFIX S.R.L.

v.

EBI MEDICAL SYSTEMS, INC.;
ELECTRO-BIOLOGY, INC.;
BIOMET, INC.

(D.C. Civil No. 96-01047)

EBI MEDICAL SYSTEMS, INC.;
ELECTRO-BIOLOGY, INC.;
BIOMET, INC.,

Appellants

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, GARTH*, and MAGILL**, *Circuit Judges*

The petition for rehearing filed by Plaintiffs-Appellees, Orthofix S.R.L., Inter Medical Supplies, Ltd., and Orthofix, Inc., in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Chief Judge Becker would have granted rehearing en banc. Judge Garth would have granted panel rehearing.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: Jul. 23, 1999

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* Hon. Leonard I. Garth as to panel rehearing only.

** Hon. Frank J. Magill, United States Court of Appeals for the Eighth Circuit, sitting by designation, as to panel rehearing only.

APPENDIX D

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The Fifth Amendment to the U.S. Constitution provides in relevant part: "nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ."

The Seventh Amendment to the U.S. Constitution provides in full as follows: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

APPENDIX E

ORTHOFIX S.r.l., ORTHOFIX INC., INTER MEDICAL SUPPLIES LTD., ORTHOFIX LTD., and ORTHOFIX INTERNATIONAL N.V.

vs.

ELECTRO-BIOLOGY, INC., EBI MEDICAL SYSTEMS, INC., and BIOMET, INC.

Civil Action No. 95-6035

SPECIAL VERDICT SHEET

(In response to any question you answer, please make an "X" in the appropriate box.)

The Plaintiffs' Claims

1. Do you find by a preponderance of the evidence that EBIMS breached the 1990 Distributor Agreement?

   Yes ✔ No —

   (If your answer to question 1 is "No," do not answer question 2. Proceed directly to question 3. If your answer to question 1 is "Yes," proceed to answer question 2.

2. Do you find by a preponderance of the evidence that Orthofix S.r.l. knowingly and voluntarily waived its right to contend that EBIMS breached the 1990 Distributor Agreement?

   Yes — No ✔

3. Do you find by a preponderance of the evidence that EBIMS breached the 1983 Agency Agreement?

   Yes ✔ No —

(If your answer to question 3 is "No," do not answer question 4. Proceed directly to question 5. If your answer to question 3 is "Yes," proceed to answer question 4.

4. Do you find by a preponderance of the evidence that Orthofix S.r.l. knowingly and voluntarily waived its right to contend that EBIMS breached the 1983 Agency Agreement?

   Yes — No ✔

5. Do you find by a preponderance of the evidence that EBIMS breached the 1984 Agency Agreement?

   Yes ✔ No —

   (If your answer to question 5 is "No," do not answer question 6. Proceed directly to question 7. If your answer to question 5 is "Yes," proceed to answer question 6.

6. Do you find by a preponderance of the evidence that Orthofix S.r.l. knowingly and voluntarily waived its right to contend that EBIMS breached the 1984 Agency Agreement?

   Yes — No ✔

7. Do you find by a preponderance of the evidence that EBIMS breached the duty of good faith and fair dealing implied in the 1990 Distributor Agreement?

   Yes ✔ No —

8. Do you find by a preponderance of the evidence that EBIMS intentionally and improperly interfered with Orthofix's reasonable expectation of prospective economic advantage?

   Yes ✔ No —

9. Do you find by a preponderance of the evidence that EBI wrongfully and intentionally interfered with the contractual relationship between Orthofix and IM[illegible]?

   Yes ✔ No —

10. Do you find, by a preponderance of the evidence, that EBI made false statement(s) of facts concerning Orthofix, which were published to at least one person other than Orthofix, and which injured Orthofix in its trade or business or exposed Orthofix to a loss of goodwill or confidence in its business or products?

    Yes ✔ No —

    If your answer to question 10 is "No," please skip question 11, and proceed directly to question 12.

11. Do you find by a preponderance of the evidence that EBI either knew that the statement(s) was/were false at the time they were made; *or* that EBI made the statement(s) with reckless disregard of its/their truth or falsity; *or* that EBI was negligent in failing to determine whether the statement(s) was/were true or false?

    Yes ✔ No —

12. Do you find by a preponderance of the evidence that EBI infringed upon Orthofix's trademark in a manner that was likely to cause confusion as to the origin or source of the product in violation of the Lanham Act?

    Yes ✔ No —

13. Do you find by a preponderance of the evidence that EBI "passed off" its products, that is, that EBI used a false designation of origin in connection with its

products in a manner that was likely to cause confusion as to the origin or source of the product in violation of the Lanham Act?

Yes ✔ No —

14. Do you find by a preponderance of the evidence that EBI made false or misleading statement(s) in violation of the Lanham Act that actually deceived or had a tendency to deceive a substantial portion of the intended audience, in a manner that was likely to influence purchasing decisions, and that there is a likelihood that Orthofix was injured in its business by such statements?

Yes ✔ No —

15. Do you find by a preponderance of the evidence that EBI uttered injurious falsehoods concerning Orthofix in violation of the Lanham Act?

Yes — No ✔

16. Do you find by a preponderance of the evidence that EBI competed unfairly in violation of New Jersey's Unfair Competition statute?

Yes ✔ No —

17. Do you find by a preponderance of the evidence that EBI competed unfairly in violation of the common law of New Jersey?

Yes ✔ No —

18. Do you find by a preponderance of the evidence that Inter Medical Systems Ltd. is owed $875,399 by EBIMS for goods sold and delivered?

Yes ✔ No —

19. If your answer to question 18 is "Yes," what amount of damages do you award to IMS on its claim for goods sold and delivered?

$875,399.00 (Eight Hundred Seventy Five Thousand Three Hundred Ninety-nine Dollars)

If you have answered "No" to question 2, question 4 or question 6; *or*, you have answered "Yes" to question 11; *or*, you have answered "Yes" to any of questions 7, 8, 9, 12, 13, 14, 15, 16 or 17; proceed to answer question 20. If not, proceed directly to question 24.

20. What amount of compensatory damages do you award to Orthofix on the claims on which you have found it has prevailed?

$48,000,000.00 (48 Million Dollars)

If your answer to question 11 was "Yes;" *or*, your answer to question 8 was "Yes;" *or*, your answer to question 9 was "Yes;" *or*, your answer to question 17 was "Yes," proceed to answer question 21. If not, proceed directly to question 24.

21. Do you find by clear and convincing evidence that harm suffered by Orthofix was the result of EBI's acts or omissions?

Yes ✔ No —

If your answer to question 21 is "No," skip questions 22 and 23, and proceed directly to question 24.

22. Do you find by clear and convincing evidence that EBI's acts or omissions were actuated by actual malice or were accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions?

Yes ✔ No —

If your answer to question 22 is "No," skip question 23, and proceed directly to question 24.

23. What amount of punitive damages, if any, do you award to Orthofix?

    $100,600,000.00 (One Hundred Million Six Hundred Thousand Dollars)

The Defendants' Counterclaims

24. Do you find by a preponderance of the evidence that Orthofix S.r.l. breached the 1990 Distributor Agreement?

    Yes ✔ No —

25. Do you find by a preponderance of the evidence that Orthofix S.r.l. breached the duty of good faith and fair dealing implied in the 1990 Distributor Agreement?

    Yes ✔ No —

26. Do you find by a preponderance of the evidence Orthofix intentionally and improperly interfered with EBIMS's reasonable expectation of prospective economic advantage?

    Yes ✔ No —

27. Do you find by a preponderance of the evidence that Orthofix wrongfully and intentionally interfered with the contractual relationship between EBIMS and IMS?

    Yes ✔ No —

28. Do you find, by a preponderance of the evidence, that Orthofix made false statement(s) of facts concerning EBI, which were published to at least one person other than EBI, and which injured EBI in its trade or business or exposed EBI to a loss of goodwill or confidence in its business or products?

    Yes — No ✔

If your answer to question 28 is "No," please skip questions 29 and 30, and proceed directly to question 31.

29. Do you find by a preponderance of the evidence that Orthofix either knew that the statement(s) was/were false at the time they were made; *or* that Orthofix made the statement(s) with reckless disregard of its/their truth or falsity; *or* that Orthofix was negligent in failing to determine whether the statement(s) was/were true or false?

N/A

Yes — No —

If your answer to question 29 is "No," please skip question 30, and proceed directly to question 31.

30. Do you find by clear and convincing evidence that Orthofix abused its qualified public interest privilege in making such statements?

N/A

Yes — No —

31. Do you find by a preponderance of the evidence that Orthofix uttered injurious falsehoods concerning EBI in violation of the Lanham Act?

Yes — No ✔

32. Do you find by a preponderance of the evidence that Orthofix uttered injurious falsehoods which caused harm to EBI in violation of the common law of New Jersey?

Yes — No ✔

33. Do you find by a preponderance of the evidence that Orthofix conferred a license upon EBIMS within the meaning of New Jersey's Franchise Practices Act?

Yes ✔ No —

If your answer to question 33 is "No," skip questions 34 through 38, and proceed directly to question 39.

34. Do you find by a preponderance of the evidence that Orthofix and EBIMS shared a "community of interest" within the meaning of New Jersey's Franchise Practices Act?

Yes — No ✔

If your answer to question 34 is "No," skip questions 35 through 38, and proceed directly to question 39.

35. Do you find by a preponderance of the evidence that the 1990 Distributor Agreement between Orthofix S.r.l. and EBIMS required or contemplated that EBIMS maintain a New Jersey "place of business" within the meaning of New Jersey's Franchise Practices Act?

N/A

Yes — No —

If your answer to question 35 is "No," skip questions 36 through 38, and proceed directly to question 39.

36. Do you find by a preponderance of the evidence that Orthofix violated New Jersey's Franchise Practices Act?

Yes — No —

N/A

If your answer to question 36 is "No," skip questions 37 and 38, and proceed directly to question 39.

37. Do you find by a preponderance of the evidence that EBIMS failed substantially to comply with the requirements of the 1990 Distributor Agreement within the meaning of New Jersey's Franchise Practices Act?

N/A

Yes — No —

If your answer to question 37 is "Yes," skip question 38 and proceed directly to question 39.

38. Do you find by a preponderance of the evidence that EBIMS sustained damages as a result of Orthofix S.r.l.'s violation of New Jersey's Franchise Practices Act?

N/A

Yes — No —

39. Do you find by a preponderance of the evidence that EBIMS is entitled to damages on its claim that Inter Medical Systems Ltd. breached the purchase order contracts?

Yes ✔ No —

40. If your answer to question 39 was "Yes," what amount of damages do you award to EBIMS as a "set off" against IMS's claim for goods sold and delivered?

$1.00 (One Dollar)

If you have answered "Yes" to any of the questions 24 through 27, questions 30 through 32, or question 38, proceed to answer question 41. If not, STOP you have reached a verdict.

41. What amount of compensatory damages do you award to EBI on the claims on which you have found that it has prevailed?

    $1.00 (One Dollar)

    If your answer to question 26 was "Yes;" *or*, your answer to question 27 was "Yes;" *or*, your answer to question 32 was "Yes," proceed to answer question 42. If not, STOP you have reached a verdict.

42. Do you find by clear and convincing evidence that the harm suffered by EBI was the result of Orthofix's acts or omissions?

    Yes ✔ No —

    If your answer to question 42 was "Yes," proceed to answer question 43. If your answer to question 42 was "No," STOP you have reached a verdict.

43. Do you find by clear and convincing evidence that Orthofix's acts or omissions were actuated by actual malice or were accompaned by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions?

    Yes — No ✔

    If your answer to question 43 was "Yes," proceed to answer question 44. If your answer to question 43 was "No," STOP you have reached a verdict.

44. What amount of punitive damages, if any, do you award to EBI.

    $_____

    /s/ Margaret Green
    Jury Foreperson

    June 2, 1997
    Date

(2)

No. 99-687

Supreme Court, U.S.
FILED
NOV 22 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ORTHOFIX S.R.L., INTER MEDICAL SUPPLIES LIMITED, AND ORTHOFIX INC.,

Petitioners,

v.

EBI MEDICAL SYSTEMS, INC., ELECTRO-BIOLOGY, INC., AND BIOMET, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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* *Counsel of Record*

Counsel for Respondents

November 22, 1999

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QUESTIONS PRESENTED

1. Whether the Third Circuit erred in concluding that the question of the constitutionally permissible maximum punitive damages award is a matter of law reviewed *de novo* on appeal.

2. Whether a punitive damages award must be deemed constitutional simply because it bears approximately a one-to-one ratio with the corresponding compensatory damages award.

3. Whether the Third Circuit, having decided that a punitive damages award exceeded the constitutional maximum, erred when (without even an adequate objection from petitioners) it ordered the award reduced to the constitutional maximum, without the option of petitioners' electing a new trial.

RULE 29.6 STATEMENT

The parent corporation of respondent EBI Medical Systems is Biomet, Inc., and the parent corporation of respondent Electro-Biology, Inc., is Biomet, Inc. Respondent Biomet, Inc., has no parent corporation. No publicly held company (other than Biomet, Inc.) owns 10% or more of the stock of any of the respondents.

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IN THE

Supreme Court of the United States

No. 99-687

ORTHOFIX S.R.L., INTER MEDICAL SUPPLIES LIMITED, AND ORTHOFIX INC.,

Petitioners,

v.

EBI MEDICAL SYSTEMS, INC., ELECTRO-BIOLOGY, INC., AND BIOMET, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (Pet. App. 64a-107a) is reported at 975 F. Supp. 681. The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a-63a) is reported at 181 F.3d 446.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1999. Petitions for rehearing were denied on July 23, 1999. Pet. App. 109a, 111a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners assert that their petition involves the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution, and the Seventh Amendment to the U.S. Constitution, which are reproduced at Pet. App. 112a.

STATEMENT

A. The Relationship Between EBI and Orthofix

Petitioners Orthofix S.r.l., Inter Medical Supplies Ltd., and Orthofix Inc. are, respectively, an Italian manufacturer of medical devices, a Cyprus-based distributor of Orthofix S.r.l.'s devices, and a Texas-based distributor of Orthofix S.r.l.'s devices in the United States. Pet. App. 3a. Petitioners will be referred to collectively as "Orthofix." Orthofix's medical devices include external bone fixators, which are orthopedic devices that hold fractured bones in alignment from outside the skin. Respondents are Biomet, Inc., an Indiana-based manufacturer of orthopedic devices, and its subsidiaries Electro-Biology, Inc., and EBI Medical Systems, Inc., the latter of which is a New Jersey-based seller of a number of orthopedic devices, including bone fixators. Pet. App. 3a. Respondents will be referred to collectively as "EBI."

From 1983 through May 31, 1995, pursuant to a series of distributor agreements, EBI served as the exclusive North American distributor of Orthofix external bone fixators and related products. Pet. App. 3a. During that 12-year period, EBI built sales of Orthofix fixators in the United States from zero to approximately $30 million per year. Pet. App. 3a-4a. About a year before the distributor agreement was to expire, however, it became clear that Orthofix was not interested in renewing the agreement, at least without a fundamental change in the agreement's pricing structure. C.A. App. 428-39, 864-65, 988-90. EBI informed Orthofix that if it maintained its

position, EBI would have no choice but to allow the agreement to expire and then enter the market itself as a competitor to Orthofix. C.A. App. 864-72.

Recognizing the likely termination of the distributor agreement, the parties began to make plans. Orthofix announced on May 8, 1995—*before* the agreement expired—that it had acquired American Medical Electronics ("AME") to serve as its new distributor. AME later became Orthofix, Inc. C.A. App. 446, 463-67.

EBI, for its part, carefully considered its obligations under the distributor agreement before deciding how to proceed. Desiring to develop a new fixator to be sold only after the agreement expired (C.A. App. 873-75), EBI consulted several lawyers on the question, including experts on Italian law, since the agreement provided that "[t]his Agreement shall be governed by the laws of the Republic of Italy." C.A. App. 210. EBI was assured that the agreement did not prohibit it from developing a new product during the agreement's term, provided no sales took place until after the agreement expired. C.A. App. 994-96.

Accordingly, during the fall of 1994, EBI began to develop a new fixator. At the same time, EBI increased its purchases of Orthofix fixators so it would have sufficient inventory to supply its customers until its new fixator became available for sale. C.A. App. 994. Orthofix, however, did not make things easy for EBI. Although EBI had sufficient inventory of some Orthofix components, its inventory of certain parts was extremely low. C.A. App. 653-54, 876-77. EBI thus submitted additional orders for these parts, but for the first time in their 12-year relationship, Orthofix began ignoring EBI's purchase orders. On one occasion, for example, EBI placed an order for $630,000 worth of goods that it never received. It turned out that Orthofix sent the goods from Italy,

but when they reached port in New York, Orthofix instructed the shipping company to redirect the delivery, first to AME in Texas and then back to Europe. C.A. App. 495-96, 832-42. Orthofix failed to supply EBI not only with fixators, but with critical parts—including clamps, screws, bushings, and cams—that are essential to a properly functioning fixation system. C.A. App. 653-54, 939-41. In all, between late 1994 and May 31, 1995, when the distributor agreement expired, Orthofix failed to fill $5.5 million in purchase orders. C.A. App. 978.

As it had planned, EBI began selling its new fixator a few months after the distributor agreement formally expired. And EBI was spectacularly successful in the marketplace. It was able to sell its new fixator to the vast majority of the parties who had previously purchased Orthofix fixators. C.A. App. 221, 929-30, 933-35.

B. The District Court Action

Orthofix filed suit against EBI in November 1995, asserting numerous theories of liability, including breach of contract, unfair competition, trademark infringement, and tortious interference with prospective economic advantage. Orthofix's central allegation was that EBI had acted improperly by developing a new fixator while the distributor agreement remained in force, even though EBI had no intention of selling—and did not sell—the new fixator until after the agreement expired. This allegation was at the heart of Orthofix's liability and damages claims.[1]

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[1] Orthofix's damages theory was based on a supposed "EBI gap," a period of about ten months during which, Orthofix argued, it should have been able to operate without competition from EBI. C.A. App. 727-28. Orthofix's argument was that if EBI had waited until the distributor agreement expired on May 31, 1995, to begin to

Orthofix's claim was based on a provision in the distributor agreement—labeled by the parties as the "handle" clause—which provided that EBI could not "distribute, sell, promote the sale of, *or in any way handle*" any competing fixator during the agreement's term. C.A. App. 205 (emphasis added). It would have been a simple matter for Orthofix to provide in the agreement that EBI could not "develop" a fixator of its own, yet it did not. Further, Orthofix conceded that nothing in the agreement barred EBI from *arranging*, during the agreement's term, to sell another company's competing fixator once the agreement expired. C.A. App. 397. Nevertheless, Orthofix contended that the prohibition against *handling* a competing fixator in fact prohibited EBI from *developing* a new fixator while the agreement was in force.

Orthofix's argument prevailed. Following a hearing on the first day of trial, the district court held that the distributor agreement unambiguously prohibited EBI from developing a competing product during the term of the agreement. C.A. App. Br. Add. 6-11. The court based its ruling entirely on "the dictionary definition and standard English usage" of the word "handle." C.A. App. Br. Add. 9. In addition, the district court concluded that the result would be the same even if the contract was ambiguous. C.A. App. Br. Add. 11-14. Accordingly, the district court instructed the jury that the "handle" clause

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develop its new fixator, it would have taken EBI at least a year—until June 1996—to bring its new fixator to market. Adjusting for two months of remaining inventory, Orthofix claimed it was entitled to a ten-month "EBI gap" during which EBI would have been unable to sell anything. C.A. App. 727-28. Accordingly, while Orthofix argued that its various tort claims "independently" supported the damages awarded by the jury, its damages theory was premised on the idea that EBI's early development of its new fixator was in breach of the distributor agreement.

prohibited "development" (C.A. App. 1129), essentially directing a verdict for Orthofix on the claim that EBI had breached the distributor agreement through its pre-termination efforts to prepare for its post-termination independence.

The jury returned a verdict for Orthofix on all theories of liability and awarded $48,875,397 in compensatory damages plus $100,600,000 in punitive damages. C.A. App. 47-48. The verdict was not entirely one-sided, though, at least regarding the issues of liability. The jury found in EBI's favor on its counterclaims that Orthofix itself had committed breach of contract, tortious interference with prospective economic advantage, and tortious interference with contract. But the jury awarded EBI only $2 in damages on those counterclaims.

The district court subsequently denied EBI's motion for judgment as a matter of law or a new trial. The court, however, ordered a remittitur reducing the punitive damages award to $50 million. C.A. App. Br. Add. 29. At the close of the evidence in the case, in fact, the district court had observed: "My personal view is, and I'm happy to state it for the record, if I was the fact finder, I don't think there is enough evidence of punitive damages." C.A. App. 1113.

C. The Third Circuit Decision

The Third Circuit affirmed the district court's interpretation of the handle clause. Pet. App. 11a-17a. In particular, the court rejected the sales-oriented definitions of "handle" that EBI had proffered.[2] The court noted, instead, that

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[2] As the court recognized, one definition of "handle" in *Webster's Third New International Dictionary* (1961) is "to trade in: engage in the buying, selling, or distributing of," and a definition of "handle" found in the *Random House Dictionary of the English Language* (2d ed. 1987) is "to deal or trade in." Pet. App. 15a.

the dictionary also includes broader definitions of "handle," and decided that because "handle" was preceded by the phrase "in any way," a "broad interpretation of the term 'handle'" was suggested. Pet. App. 16a-17a.[3] Thus, the court concluded that "the Agreement prohibited EBI from researching and developing a competing product during the tenure of that contract." Pet. App. 17a.

The Third Circuit also affirmed the compensatory damages award. EBI had attacked the award on numerous bases, including that Orthofix's claims for *future* lost profits were the result of unvarnished speculation. Pet. App. 26a-29a.[4] The court observed that the $48 million compensatory damages

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[3] The court noted that Orthofix had pointed out that "handle" is also defined in *Webster's Third New International Dictionary* as meaning "2(b): to conduct oneself in relation to, assume an attitude"; "2(c)(1): manage, control direct"; and "2(e): deal with, act upon, dispose of, perform some function with regard to," and in the *Random House Dictionary of the English Language* as meaning "11. to manage, deal with, or be responsible for" and "13. to manage, direct, train, or control." Pet. App. 15a. The court relied on those definitions notwithstanding that they do not focus on the sales context of the distributor agreement at issue here.

[4] As noted above, Orthofix's damages claim was based on the argument that EBI's breach of the "handle" clause allowed EBI to sell a competing fixator earlier than it otherwise could have done. But Orthofix's damages were not confined to the sales it allegedly lost during the period when Orthofix claimed the right to be free from EBI's competition (the "EBI gap"), an estimated $4 million. Rather, Orthofix claimed that it would have captured in perpetuity all the sales that EBI had previously made. Thus, the bulk of the $95 million Orthofix sought in damages derived from sales it allegedly lost *after* the "EBI gap" had ended, when EBI had the uncontested right to market a competing fixator.

award "appears large." Pet. App. 27a. At the same time, however, the court noted that the standard of review was "abuse of discretion," that "precision" is not required in proving damages, and that EBI's arguments regarding the credibility of Orthofix's expert witness, and the reliability of that witness's assumptions, were made to the jury. Pet. App. 29a.

EBI made numerous attacks on the $50 million punitive damages award, arguing that the award should be "vacated or, at a minimum, remanded for a new trial." C.A. App. Br. 39. The Third Circuit rejected some of the arguments. Pet. App. 30a-31a (rejecting the argument that the award had to be reversed because the failure of the compensatory damages award to distinguish between tort damages, which could support a punitive award, and contract damages, which could not, meant that no ratio between compensatory damages and punitive damages could be determined), 32a-33a (rejecting EBI's argument that the punitive award resulted from improper "passion and prejudice"), 33a-34a (rejecting EBI's argument that Orthofix had not provided evidence regarding each defendant's financial condition, as required by New Jersey law).

The Third Circuit did conclude, however, as EBI had argued, that the $50 million punitive damages was constitutionally exorbitant under the Due Process Clause of the Fourteenth Amendment. Pet. App. 34a-41a. Initially, the Court discussed the three "guideposts" this Court identified in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), as relevant to the question whether a punitive damages award passes constitutional muster: (1) the reprehensibility of the conduct, which this Court called "'[p]erhaps the most important indicium of the reasonableness of a punitive damages award,'" Pet. App. 35a (quoting *BMW*, 517 U.S. at 575); (2) the "'ratio'"

of punitive damages "'to the actual harm inflicted on the plaintiff,'" Pet. App. 36a (quoting *BMW*, 517 U.S. at 580); and (3) "a comparison of the punitive damages and the potential civil or criminal penalties for comparable misconduct," Pet. App. 37a (citing *BMW*, 517 U.S. at 583).

Considering the first—and "most important"—guidepost, reprehensibility, the court noted that "the harm inflicted on Orthofix was economic, rather than physical, and hence 'less worthy of large punitive awards than torts inflicting injuries to health or safety.'" Pet. App. 38a (quoting *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 638 (10th Cir. 1996)). Further, the court noted that Orthofix was "not a financially weak or vulnerable target," that Orthofix had failed to protect itself contractually by providing for specific remedies in the event of a breach, and also that "Orthofix itself breached the distributor agreement, failed to fill and ship EBI's legitimate orders, and engaged in tortious acts." Pet. App. 39a. In addition, the court recognized aggravating factors, including that the jury found that EBI acted with either "actual malice" or "a wanton and willful disregard of persons who foreseeably might be harmed," that EBI's conduct "involved acts of deception and, at least, reckless disregard of the consequences to Orthofix," and that EBI's conduct "continued over an extended period of time with full awareness of the harm to Orthofix." Pet. App. 39a.

Recognizing all of these factors, pro and con, the court concluded that "EBI's conduct, which included only economic harm for which large compensatory damages have been awarded, was not sufficiently egregious to warrant a punitive damages award of $50 million. In this connection, we take into consideration that high, easily calculable compensatory damages may more appropriately be accompanied by a lower

punitive damages ratio." Pet. App. 39a (citing *BMW*, 517 U.S. at 582).[5]

The court then addressed the question of what the constitutional maximum was, under *BMW*, for the conduct involved in this case. The court, recognizing that no formula existed that would resolve the issue, ultimately reached the following conclusion:

> In the last analysis, an appellate panel, convinced that it must reduce an award of punitive damages, must rely on its combined experience and judgment. When different members reach different figures, they must seek an accommodation among their views, a process that recurs throughout appellate decision making. After reviewing the record and the arguments in this case, we conclude that the proper, reasonable punitive damages award is no more than $1 million.

Pet. App. 41a. In the balance of its opinion, the Third Circuit addressed the points Judge Garth made in his dissent.

REASONS FOR DENYING THE PETITION

The intercircuit conflicts that petitioners claim to exist do not, and the decision below is correct. Moreover, one of the questions was not properly preserved below. None of the issues warrants review by this Court.

Regarding the first question presented, the courts of appeal are not in conflict over the distinction properly reflected in the Third Circuit's ruling in this case. The determination of

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[5] The court also specifically discussed the third guidepost, "reference to the sanctions for comparable misconduct," but concluded that in this case the comparison was "unhelpful." Pet. App. 39a.

the constitutionally permissible maximum level for a punitive damages award, like other legal determinations, is reviewed *de novo*. In contrast, the determination that the amount awarded was excessive, being an exercise by the trial court of its traditional common-law power to order a new trial where the verdict rendered is against the weight of the evidence, is reviewed for abuse of discretion.

The second question presented, relating to the proper ratio between the compensatory damages award and the punitive damages award, is nothing but a disagreement with the particular determination of a highly context-specific issue in this case, presenting no issue that warrants this Court's review. This Court has previously decided that no bright-line test can or should be established to resolve this question. There is no need to revisit that conclusion in this case.

Finally, review is not warranted of the third question presented, concerning the form of "relief" following an appellate court's determination of the constitutional maximum. Petitioners did not adequately preserve their current contention in the court below, which therefore did not specifically discuss it. In any event, as with the standard of appellate review addressed in the first question, the courts of appeals are not in conflict over the form of relief (as to which the Third Circuit's judgment is correct). Whereas a common-law excessiveness weight-of-the-evidence decision may permit only a new trial, a punitive damages award may properly be reduced, by court order, to its maximum legal level.

I. THE FIRST QUESTION PRESENTED DOES NOT WARRANT REVIEW

Petitioners are wrong in alleging a conflict among the circuits regarding the standard of appellate review (not the substantive constitutional standard, also often labeled the "standard of review") that should be applied in assessing the

constitutionality of a punitive damages award. In particular, the Third Circuit decision in this case, which addressed the issue of what the constitutionally permissible maximum award was on the facts presented, conflicts with none of the court of appeals decisions petitioners cite. Petitioners' contrary allegation rests on a conflating of legal issues that are distinct and a mischaracterization of the Third Circuit's decision here. Correcting petitioners' confusion shows that the alleged conflict is illusory and, indeed, that the Third Circuit's decision is correct.

A. Two of the decisions alleged to be in conflict with the decision reached by the Third Circuit here—*Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996), and *Pavon v. Swift Transportation Co.*, 192 F.3d 902 (9th Cir. 1999)—involved a review of the traditional excessiveness/unreasonableness determination made under Fed. R. Civ. P. 59(a), relating solely to whether a new trial should be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Neither decision involved a determination of the maximum legal (here, constitutional) level of an award, as the Third Circuit made in this case.[6] It is not disputed here that, where a court of appeals is reviewing a

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[6] Several procedural vehicles may be available in a district court for a request to reduce punitive damages on grounds of constitutional exorbitance. In *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir.), *cert. denied*, 68 U.S.L.W. 3244 (U.S. Oct. 12, 1999) (No. 99-252), the court pointed to Fed. R. Civ. P. 50, governing motions for judgment as a matter of law. 170 F.3d at 1331. An alternative is Fed. R. Civ. P. 59(e), addressing motions to alter or amend a judgment. *See, e.g., Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1331 (10th Cir. 1996) (holding that a district court's decision to vacate a punitive damages award was pursuant to Rule 59(e)).

district court's new-trial ruling under Rule 59(a) as to whether a punitive damages award is excessive, the standard of review is abuse of discretion. Where, however, the issue is constitutional exorbitance, as with other issues about legal limits, the standard of review is *de novo*.

In *Lee*, for example, the court stated that it was reviewing the punitive damages award involved there "for abuse of discretion," but in making that observation it relied directly on this Court's discussion of that standard in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 434-36 (1996), which involved a Rule 59(a) new-trial motion. Indeed, the court in *Lee* noted not only the relevance, but the distinctness, of the constitutional standards of *BMW*. *See Lee*, 101 F.3d at 809 n.2. It is clear, moreover, that *Lee* in fact involved *only* a Rule 59(a) excessiveness motion, as the district court stated explicitly. *Lee v. Edwards*, 906 F. Supp. 94, 97-99 (D. Conn. 1995). Not surprisingly, then, the *Lee* court simply took for granted that the applicable standard of review was the one governing traditional Rule 59(a) excessiveness determinations.

The Ninth Circuit decision on which petitioners rely, *Pavon*, is no different. As petitioners' own excerpted quotation expressly indicates, *Pavon* involved a traditional determination, under Rule 59(a), whether the amount actually awarded was excessive and, for that reason, warranted a new trial. *See* Pet. 15 (quoting *Pavon*, which refers to "Rule 59"). The *Pavon* court did not address the legal issue of the constitutional maximum.

B. Undoubtedly, there is an overlap in reviewing a given punitive damages award for factual excessiveness or unreasonableness under the traditional common-law new-trial standards and determining what, on the evidence, a constitutional maximum would be. These reviews, however, are practically distinct: the former determines only that what

was actually awarded was against the weight of the evidence, without necessarily determining, as with the latter, a maximum permissible level. The issues are also legally distinct, as the district court in this case recognized in giving separate consideration to the issues. *Compare* Pet. App. 90a-92a *with* Pet. App. 97a-106a.

This distinction is implicitly recognized by petitioners themselves in their carefully worded characterization of *Gasperini* and *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), as no more than "in tension" with the Third Circuit decision here. Pet. 17-18. *Gasperini* and *Browning-Ferris* both involved only Rule 59(a) excessiveness assessments. Indeed, petitioners recognize that *Browning-Ferris* involved "federal common law" review, pursuant to "Rule 59." *See* Pet. 17; *see also* Pet. 14-15. And *Gasperini* specifically contrasts the constitutional-maximum issue with the common-law excessiveness issue. 518 U.S. at 430 n.12. Indeed, the whole discussion in *Gasperini* of the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), which applies only when substantive state law is at issue, would have been pointless if the federal constitutional standards for punitive-damages awards had been the standards at issue.

C. Petitioners' additional basis for an alleged conflict is the Eleventh Circuit's decision in *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir.), *cert. denied*, 68 U.S.L.W. 3244 (U.S. Oct. 12, 1999) (No. 99-252). As petitioners recognize, however, *Johansen* was explicit in holding that the constitutional-maximum determination is an issue of law reviewed *de novo*, thus directly supporting the Third Circuit's decision and undermining petitioners' contention. 170 F.3d at 1334. Moreover, *Johansen* is explicit in making the very distinction that petitioners blur. *Johansen* explains that the

common-law excessiveness/unreasonableness determination is (as Rule 59(a)'s text makes clear) an issue within the scope of the traditional authority of judges to grant new trials where the verdict is against the weight of the evidence and is subject to abuse-of-discretion review. 170 F.3d at 1328 & n.8, 1331, 1334. In contrast, *Johansen* recognizes, the constitutional-maximum determination "is a determination that the law does not permit the award" and is subject to the usual duty of appellate courts to determine legal issues *de novo*. 170 F.3d at 1331, 1334.

Because *Johansen's* main holding is directly contrary to petitioners' view, petitioners try instead to fasten onto *Johansen's* observation that factual findings made by the district court as part of its constitutional-maximum determination are subject to Rule 52(a) "clearly erroneous" review. Pet. 16 (quoting *Johansen*, 170 F.3d at 1335). But, in addition to the facts that *Johansen* itself calls for careful factor-by-factor scrutiny even under the Rule 52 standard (170 F.3d at 1335) and reduced an award despite specific jury findings of bad intent (*id.* at 1336), the difficulty with petitioners' effort to use *Johansen* affirmatively is that nothing in the Third Circuit's opinion repudiates the principle that facts found by the district court are subject to "clearly erroneous" review. To the contrary, the Third Circuit was careful not only to refer without disapproval to the "deference which we accord the trial court in such matters" (Pet. App. 43a), but to indicate that its ruling rested on its own overall assessment of what punitive award could be supported by the mix of relevant facts, including (without overturning) the "facts with respect to reprehensibility" found by the jury (Pet. App. 39a). Nothing in *Johansen* conflicts with that approach.

Indeed, the Third Circuit hardly had before it, so hardly had to disagree with, significant factual "findings" by the

district court favorable to petitioners. The district court's constitutional analysis says almost nothing about the facts (Pet. App. 90a-92a), and neither in that analysis nor in its non-constitutional analysis did the court make "findings" so much as recount what evidence was before the jury, from which the jury could have made certain findings (Pet. App. 97a-106a). Moreover, in its constitutional analysis, the district court said that evidence of respondents' bad faith or persistence was "not abundant" (though such evidence was not "totally absent") and the conduct at issue caused no serious physical or environmental hazard (one patient was "'inconvenienced'"). Pet. App. 91a. Indeed, in its non-constitutional excessiveness review, the court expressly noted that there was no evidence that respondents' conduct was likely to recur or that it presented any threat to public health. Pet. App. 102a. And the district court had previously stated on the record: "[I]f I was the fact finder, I don't think there is enough evidence of punitive damages." C.A. App. 1113.

There is, accordingly, no conflict on the issue of appellate standards of review for constitutional-maximum determinations.[7]

D. Nor is there other reason for review of the issue here. In particular, this issue was not "expressly reserved for future decision in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994)." Pet. 11. The *Oberg* footnote reserved either the question of the substantive constitutional standard or the

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[7] In *Continental Trend Resources, Inc. v. OXY USA Inc.*, 520 U.S. 1241 (1997), this Court denied certiorari on a petition that presented the issue of the "federal appellate court's *de novo* review of a punitive damage award" (for compliance with constitutional standards, *see Continental*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997)).

question of how *non*-deferential an appellate court's review must be to satisfy the constitutional due-process requirement of meaningful appellate review of punitive damages awards. Petitioners' first question does not address the substantive constitutional standard, and what they seek is less, not more, vigorous appellate review. *Oberg* is irrelevant.

And, for the reasons already indicated, the Third Circuit was correct (and in accord with *Johansen*) in applying a *de novo* standard of appellate review when determining the constitutional maximum for any punitive damages award on the present facts. The decision properly treats this legal issue like other applications of constitutional standards to the facts. Neither *BMW* nor its predecessors suggests mere abuse-of-discretion review of the constitutional question, while, as noted, *Gasperini* and *Browning-Ferris* did not involve that question.

In a recent decision involving the closely related issue of Excessive Fines Clause review of punitive forfeitures, this Court all but summarily rejected the contention "that a district court's determination of excessiveness should be reviewed by an appellate court for abuse of discretion," concluding instead that, while factual findings "must be accepted unless clearly erroneous," the "question of whether a fine is constitutionally exorbitant calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." *United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998) (citing *Ornelas v. United States*, 517 U.S. 690, 697 (1996)). As with Excessive Fines review, the particular constitutional standard here—demanding some reasonable measure of predictability and uniformity as to the outer bounds of punitive damages, based on a range of relevant comparative legislative and judicial experience—would be especially ill-suited for highly deferential abuse-of-discretion review. *See id.*; *Ornelas*, 517

U.S. at 697. Indeed, for just such reasons, even under the traditional common-law new trial excessiveness standard, this Court has recognized that discretion can be abused by passing a limit that is a "question of law." *Gasperini*, 518 U.S. at 435.

II. THE SECOND QUESTION PRESENTED DOES NOT WARRANT REVIEW

There is no merit to petitioners' contention that this Court should review the Third Circuit's conclusion that $1 million was the maximum punitive damages award that the Constitution permitted in this case. That conclusion was entirely based on the circumstances of the present case and is without general applicability.

A. Nothing in *BMW* supports petitioners' contention that a punitive damages award that bears approximately a one-to-one ratio to the compensatory award should, for that reason alone, be immune from constitutional challenge. In *BMW*, in fact, this Court refused to set a bright-line test regarding the permissible ratio between the punitive damages award and the compensatory award. 517 U.S. at 582 ("Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award."). On the contrary, the Court called for a context-specific inquiry in *BMW*, requiring examination of a variety of factors bearing on appropriateness given the purposes of punitive damages.

Indeed, while petitioners grudgingly recognize that the Court in *BMW* "set forth two other guideposts" in addition to the punitive-compensatory "ratio" (*see* Pet. 23 n.14), there is no merit whatsoever to petitioners' assertion that the purpose of these "other" guideposts is merely to act as a check on punitive damages awards in cases where the ratio appears high (*see id.*). The Court made it clear in *BMW* that the ratio between the

punitive and compensatory awards is only one factor to be considered, and not even the most important factor. Rather, it is the first guidepost—the reprehensibility of the defendant's conduct—that the Court labeled as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *BMW*, 517 U.S. at 575.

Here, the Third Circuit reasonably concluded that the purposes of punitive damages could not justify more than a $1 million award for what was, at bottom, a purely commercial dispute between sizable companies. The harm was "economic" only, not physical. Pet. App. 38a. Petitioners were not "a financially weak or vulnerable target." Pet. App. 39a. Petitioners could, indeed, have provided contractually for specific remedies in the event of a breach. Pet. App. 39a. Petitioners themselves "breached the distributor agreement [with respondents], failed to fill and ship [respondents'] legitimate orders, and engaged in tortious acts." Pet. App. 39a. And the "compensatory" award was already a "large" one, involving "easily calculable" damages. Pet. App. 39a.

B. There is no merit to petitioners' claim that "the combined award of $98 million" ($48 million in compensatory damages and $50 million in punitive damages) was necessary to remove "the profit EBI had obtained by 'securing for [itself] the market in bone fixators which had previously been Orthofix's.'" Pet. 25. The district court never made any finding of such profits.[8] Petitioners can fairly say no more than

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[8] Throughout their petition, petitioners attempt to color the facts with the incorrect assertion that EBI had profits of (or was unjustly enriched by) $98 million. Pet. i, 3, 4 & n.2, 5 n.3, 6, 8 n.5, 12, 20, 25. A particular egregious example is petitioners' statement that the district court "concluded that New Jersey's Punitive Damages Act limited the jury's consideration to EBI's actual unjust

that they "presented *evidence* that, by securing for themselves the market in bone fixators which had previously been Orthofix's, defendants profited by 'approximately 97 million dollars.'" Pet. App. 101a (emphasis added). But there is no reason to think that either the district court or the jury accepted this evidence, which had been provided by petitioners' damages expert, Mr. Hoffman. Indeed, the jury's verdict for $48 million in compensatory damages shows that the jury *rejected* Mr. Hoffman's testimony that petitioners had suffered "lost profits" damages of $95 million. C.A. App. 726. There is nothing to indicate that in this case there is any difference between petitioners' damages, which the jury found to be $48 million, and EBI's profits, concerning which no finding was ever made.

Thus, petitioners' claim that review by this Court is necessary because the Third Circuit's decision "illustrates the confusion" the lower courts have regarding the effect of a defendant's profits on the punitive damages calculus (Pet. 25) is without merit. Since there was never a finding that EBI profited by $98 million, it is hardly surprising that the Third Circuit "did not mention" that. Pet. 25. No issue as to the role of a defendant's profits is presented by the Third Circuit's decision.

C. In sum, the Third Circuit reduced the punitive damages award in this case to $1 million based on a thorough consideration of EBI's conduct. Nothing in the court's analysis—which was specific to the particular circumstances of

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enrichment of $98 million." Pet. 5 n.3. In actuality, the district court stated only that the jury was limited to considering the defendant's *actual* profits, rather than its *potential* profits. But neither then nor at any other time did the court ever attach a number to EBI's profits (or unjust enrichment). Pet. App. 92a & n.8.

this case—warrants review by this Court. In particular, there is no reason to establish, as petitioners would have this Court do, a rule that as long as the ratio between punitive damages and compensatory damages in a case is no more than approximately one to one, that one factor conclusively establishes that the punitive damages award satisfies the Constitution.

III. THE THIRD QUESTION PRESENTED DOES NOT WARRANT REVIEW

Petitioners briefly contend, as their last question presented, that this Court should review whether a new trial (subject to remittitur) is the only proper form of appellate relief after a determination of the maximum constitutionally permissible amount of punitive damages. But, as indicated by petitioners' placement of the issue and the absence of any discussion of this issue by the Third Circuit (or the dissent), petitioners did not adequately preserve this question below. And there is no justification for review of this question in any event.

A. The Court repeatedly has refused to review questions neither pressed nor passed on below. *See, e.g., Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 400 n.7 (1996); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990). Not until the final footnote (on the final page) of their Petition for Rehearing En Banc in the Third Circuit did petitioners contend that accepting respondents' constitutional argument could result only in a new trial (subject to remittitur). Even then, all petitioners did was to state the issue in a single sentence, merely citing *Johansen* without argument or elaboration. Petition for Rehearing at 15 n.9. The issue was not one of the issues identified in the Statement of Counsel required by the

Third Circuit's rules for *en banc* rehearing. *See* Third Cir. L.R. 35.1.

Petitioners did not adequately raise the issue below. First, this kind of bare unelaborated footnote contention, without even an express statement of the issue, is inadequate even if respondents could have waited to raise the point until rehearing.[9] Second, rehearing was already too late. When respondents, as appellants, argued to the Third Circuit that the punitive damages award was unconstitutionally excessive, and should be vacated *or* remanded for a new trial, petitioners did not respond that, even if the award was unconstitutional, the only proper remedy was a new trial, rather than appellate reduction of the award. Because the issue of remedy was anything but unanticipated prior to the panel decision, petitioners' current objection was forfeited when it was not raised until rehearing. *See, e.g.*, *Wills v. Texas*, 511 U.S. 1097 (1994) (O'Connor, J., concurring in denial of certiorari) ("It has been the traditional practice of this Court, however, to decline to review claims raised for the first time on rehearing in the court below."); *Estate of Wilson v. Aiken Indus., Inc.*, 439 U.S. 877, 879 (1978) (Blackmun, J., concurring); *Herndon v. Georgia*, 295 U.S. 441, 443-44 (1935); *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 366-67 (1932).

B. In any event, the issue does not warrant review. The Eleventh Circuit's *Johansen* decision is the only full discussion of this issue. *Johansen* explains clearly that the limitation of relief to a new trial (subject to remittitur) applies only to traditional common-law excessiveness determinations (whether for punitive or compensatory damages)—which was what was

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[9] *See, e.g.*, *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1424 (9th Cir. 1994) (deeming waived an issue raised solely by footnote).

involved in this Court's decision in *Hetzel v. Prince William County*, 523 U.S. 208 (1998). A determination that the maximum constitutionally permissible award is a certain amount, in contrast, is a determination of a legal limit that appellate courts have long been permitted to embody in an order directing entry of a corrected judgment. *Johansen*, 170 F.3d at 1330-33; *id.* at 1330 (discussing, in particular, *New York, Lake Erie & W.R.R. Co. v. Estill*, 147 U.S. 591 (1893)). That is what the Third Circuit properly did in this case, without objection from petitioners and without express discussion.

There is no intercircuit conflict on this issue, let alone one sufficiently well developed to warrant review of the Third Circuit's proper application of governing legal standards. The Second Circuit decision in *Lee*, as already noted, involved a traditional new-trial excessiveness determination and so did not present this issue at all. The Tenth Circuit in *Continental Trend Resources*, after making a constitutional determination, said no more than that a remand for a new trial (subject to remittitur) was the "preferable" course, at least in that case. 101 F.3d at 643. It did not hold that such a remedy was always required and did not undertake any analysis of the issue. In an appropriate case, the Tenth Circuit presumably will have occasion to consider the *Johansen* analysis and whether the preference is only that or whether it is actually a requirement—even in cases where it would be pointless.

This is such a case. As explained in *Johansen*, in many cases "[g]iving a plaintiff the option of a new trial rather than accepting the constitutional maximum for [its] case would be of no value." 170 F.3d at 1332 n.19. In contrast to the usual Rule 59(a) determination simply that the amount awarded is excessive, leaving open the question of what a permissible amount would be, this case involves a determination of a constitutional upper limit on the established facts. Only if the

plaintiff had new facts to present, and were properly permitted to present new facts omitted from the first trial, would there be any possibility of the plaintiff's obtaining a sustainable award higher than the already-determined constitutional maximum. Petitioners have not remotely suggested what additional facts they would be entitled to establish and would establish at a new trial. Consistent with their failure to preserve this issue below, petitioners' request for a new trial appears to be an afterthought, and far from the kind of issue that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1999

ORTHOFIX S.R.L., INTER MEDICAL SUPPLIES LIMITED, AND ORTHOFIX INC.,

Petitioners,

v

EBI MEDICAL SYSTEMS, INC., ELECTRO-BIOLOGY, INC., AND BIOMET, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF ERWIN CHEMERINSKY AND ARTHUR F. McEVOY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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of Petitioner, in *Gasperni v. Center for Humanities*,
No. 95-719 (filed March 1, 1996) 14, 17-18
David G. Knibb, *Federal Court of*
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INTEREST OF *AMICI CURIAE*

Amici curiae are law professors with expertise in the fields of federal jurisdiction, constitutional law and legal history, both of whom appeared as *amici* in the last major case in which this Court grappled with the proper scope of federal appellate review of jury damage awards, *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). Our qualifications are summarized in the Appendix.[1]

We have no interest in the outcome of the particular lawsuit at bar. We file this brief solely to alert the Court to the need to grant certiorari in this case to resolve the first question presented in the petition, which addresses the fundamental conflict and confusion among the federal circuit court of appeals regarding the proper scope of appellate review for jury-awarded punitive damages.[2]

SUMMARY OF ARGUMENT

Petitioners ask this Court to grant review in this case, first and foremost, to resolve a conflict that exists among the federal circuit courts of appeals regarding the nature of federal appellate review of punitive damage awards issued by juries. *See* Petition for Certiorari ("Pet.") at 13-20. Although we differ somewhat with petitioners on how the differing approaches among the circuits are most accurately described, and which circuits follow each approach, the circuit conflict discussed by petitioners is real and substantial. If anything, petitioners understate the importance of the circuit conflict, particularly with respect to the marked departure by some circuits, in the punitive damages context, from the standard of appellate review that has traditionally been used in criminal litigation and civil litigation alike where one party argues that the result reached by the jury is not rationally sustainable on the particular record of the case.

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Although the other two questions presented in the petition may well be certworthy, we limit this *amicus* brief to an analysis of the first question.

Several circuits, when reviewing federal substantive due process attacks on punitive damage awards for "gross excessiveness," engage in a *de novo* review of whether the amount awarded by the jury is rational on the particular record. This review gives no particular deference to the district court's analysis of whether the award is constitutionally excessive, a matter that is treated as a classic "legal" issue, determined with the record evidence viewed in the light most favorable to the jury's verdict. This approach comports with the test adopted by this Court for appellate court review of criminal liability, *see, e.g.*, *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979), and its close analogs used in appellate review of civil liability and of the severity of criminal and civil penalties. *Jackson*'s "rational factfinder" approach is appropriate for the appellate review of jury-awarded punitive damages, as this Court strongly implied in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994).

Other circuits, in articulating a standard of review for punitive damage awards, have departed from this traditional "rational factfinder" approach. Rather than examining the record *de novo* to determine whether the result reached by the jury was rational, the Eleventh Circuit uses a standard of review that defers to so-called "factual" findings made by district courts concerning the level of reprehensibility of the defendant's conduct and other key factors bearing on the ultimate legal issue of gross excessiveness. This approach creates twin risks. One is the risk of undue interference with rational jury verdicts (as district courts enjoy leeway to throw out verdicts that would be found rational on *de novo* review). The other is the risk of approval of irrational jury verdicts (as district courts enjoy leeway to uphold verdicts that would be found irrational on *de novo* review).

The Third Circuit, as indicated by the decision below, has likewise departed from the traditional standard of *de novo* review of a jury verdict's rationality in the context of reviewing punitive damage awards. The Third Circuit reads this Court's precedents as requiring appellate judges to engage in "intensive review" of punitive damage awards, and to use their own experience and judgment to ensure that only appropriate awards are upheld. This

expansive review standard violates statutory and constitutional strictures on the scope of federal appellate review of jury verdicts.

This Court should grant review to resolve the conflict among the federal circuit courts of appeals concerning the proper standard for reviewing federal substantive due process attacks on jury-awarded punitive damages. The proper standard of appellate review is an important and frequently recurring matter that should be addressed at the earliest available opportunity.

ARGUMENT

CERTIORARI IS WARRANTED IN LIGHT OF THE CONFLICT AND CONFUSION AMONG THE FEDERAL CIRCUIT COURTS OF APPEALS CONCERNING THE REVIEW OF JURY-AWARDED PUNITIVE DAMAGES

The Eleventh Circuit recently suggested that the issue of the proper appellate standard of review for federal substantive due process attacks on jury-awarded punitive damages is an "issue of first impression" nationally. *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1334 (11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999). We disagree. Although the precise standard used by each circuit is difficult to define with absolute precision, and although some circuits have not specifically addressed this issue, it is plain that an important circuit conflict exists as to the standard of review. For the most part, the circuit conflict is ably summarized by petitioners, *see* Pet. at 13-20, although our view of several of the cases discussed by petitioners is somewhat different than theirs.

The three different approaches are these: (a) under the approach of several circuits, *de novo* review of what is termed a "legal" issue under a "rational factfinder" standard, which we believe is the correct approach; (b) under the Eleventh Circuit's approach, a nominally *de novo* review framework, coupled with deferential review of district court "factual" findings; and (c) under the Third Circuit's approach, an "intensive review" of the punitive damage award, conducted with the benefit of the appellate judges' own experience and judgment concerning what size award is

reasonable. We describe each approach and briefly summarize why we believe the first approach is the correct one.

A. Several Circuits Engage in *De Novo* Review of Whether the Jury's Award is Rationally Supportable on the Record, Consistent With the Traditional Standard of Review for Both Criminal and Civil Jury Verdicts

Petitioners identify two circuits, the Second and Ninth Circuits, as employing an "abuse of discretion" standard in reviewing constitutional excessiveness determinations by district courts with respect to jury-awarded punitive damages. Pet. at 14-15. As we read the cases cited by petitioners, the substance of the review standard is *de novo* review of whether the amount of punitive damages awarded is rationally supported by the record evidence, using a standard akin to the "rational factfinder" standard articulated in *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979), and related cases. Review of "abuse of discretion" is nominally involved because this is the label typically attached to review of a district court's ruling on a new trial motion. But there is no discretion actually accorded the district court. Rather, in these circuits, excessiveness is treated as a "legal" question, decided on the record with all legitimate factual inferences drawn in favor of the jury's result, and a district court perforce abuses its discretion in upholding a verdict that lacks rational support in the record.

This point is most clear with respect to *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996), in which the Second Circuit explained that in reviewing a punitive damage award "for abuse of discretion," it decides a "question of law" concerning the "upper limit" supported by the record, to determine whether the amount of the award is "rational." *Id.* at 808-09 (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435 (1996), and *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992)). It applied this standard to a prison beating case and held that the maximum punitive damage award supported by the record was $75,000 (as opposed to the $200,000 awarded by the jury and upheld by the district court). In doing so, the Second Circuit decided the federal substantive due process attack on the verdict based on a *de novo* review of the

inferences supported by the record, without any deference to the district court's view of the record. *Id.* at 809-13.

Similarly, in the Ninth Circuit case cited by petitioners, *Pavon v. Swift Transp. Co.*, 1999 WL 729132 (9th Cir. 1999), the court employed what it described as an "abuse of discretion" standard in upholding a $300,000 punitive damages verdict in an employment discrimination case, but its analysis made clear that a "rational factfinder" standard was actually at work. Thus, the court stated that the issue was whether the punitive damage award was excessive "as a matter of law," *id.* at *5, and in evaluating the record evidence supporting the award it focused on what "[t]he jury could have concluded" and what "the jury could have found." *Id.*

This use of the "abuse of discretion" label to describe what is in substance a review of the trial record under a "rational factfinder" standard, without any particular deference to the views of the district court concerning the trial record, is hardly new to federal appellate review of jury damage awards. For example, during the 1960s, when the existence of *any* federal appellate authority to review excessiveness claims was a matter of considerable dispute, *see, e.g.*, *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 446-48 & n.3 (8th Cir.) (Blackmun, J.), *cert. denied*, 369 U.S. 929 (1961), the Fifth Circuit emphasized that the function of appellate review was to decide whether the district court had abused its discretion in upholding a verdict that was without rational support on the record. In *Glazer v. Glazer*, 374 F.2d 390 (5th Cir.) (Wisdom, J.), *cert. denied*, 389 U.S. 831 (1967), the court struck down a $1.9 million compensatory award for breach of contract. In doing so, it stated that the district court had abused its discretion because "[t]he verdict was excessive *as a matter of law* in that it exceeds any *rational* appraisal or estimate of the damages that could be based upon the evidence before the jury." *Id.* at 413 (emphasis added). This linkage between the "abuse of discretion" label and the "rational factfinder" substance of the review of compensatory damages has persisted to this day.[3]

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[3] *See, e.g.*, *Mejias-Quiros v. Maxxam Prop. Corp.*, 108 F.3d 425, 427-29 (1st Cir. 1997) (stating that under *Gasperini*'s abuse-of-discretion review

Besides the Second and Ninth Circuits in the decisions cited by petitioners, at least three other circuits appear to employ a "rational factfinder" standard of appellate review in assessing claims that a jury's award of punitive damages is grossly excessive. More than a decade ago the Seventh Circuit, in *Strauss v. Stratojac Corp.*, 810 F.2d 679 (7th Cir. 1987), reiterated settled precedent that it would find a punitive damage award excessive on appeal only if there is "'no rational connection between the evidence on the damages and the verdict,'" and in that case it upheld the punitive award on the finding that it did "not seem irrational." *Id.* at 686.

Likewise, the Eighth Circuit, in *Jacobs Mfg. Co. v. Sam Brown Co.*, 19 F.3d 1259 (8th Cir.), *cert. denied*, 513 U.S. 989 (1994), indicated that a punitive damage award should not be disturbed based on a "gross excessiveness" analysis unless the amount awarded "was so unrealistic that it showed irrational rather than reasonable jury behavior." *Id.* at 1266 (citation omitted). The Eighth Circuit reinstated in full the jury's $2.7 million punitive damage award that the district court had found excessive, based on its own conclusion, after a review of the record, that there was no indication that the award "could only have resulted from irrational jury behavior." *Id.* (citation omitted). The court applied *de novo* review of the jury's underlying award, under a "rational factfinder" standard, and there was no deference to the district court's analysis of the amount of the award. Recently, the Eighth Circuit explicitly held that in reviewing federal substantive due process challenges to punitive damage awards, it will "review the district court's conclusions de novo." *United States v. Big D Enterprises, Inc.*, 184

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standard, a district court's denial of a new trial on damages will be overturned "only if the damages awarded lack 'a rational basis in evidence,'" and concluding that the $25,000 award for medical expenses "lacked any rational basis" in the record) (citation omitted); *Air Safety, Inc. v. Roman Catholic Archbishop*, 94 F.3d 1, 4 (1st Cir. 1996) (stating that the proper scope of review "is narrow" and that "an abuse of discretion" cannot be found where "the jury award has a rational basis in evidence") (citation omitted); *Jamison Co. v. Westvaco Corp.*, 526 F.2d 922, 927 (5th Cir. 1976) (reaffirming *Glazer*).

F.3d 924, 932-33 (8th Cir. 1999).[4]

Finally, it appears that the Tenth Circuit also applies a *de novo* standard of review, under which no deference is owed to the district court and the sole issue is whether, drawing all legitimate factual inferences in favor of the jury's verdict, the amount of the punitive damage award is irrationally excessive. In *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 642-43 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997), the court stated that whether a given award violates federal substantive due process is "a federal constitutional issue" that is "one of constitutional fact that the appellate courts have the power to decide" based on their "review of the record."

The "rational factfinder" standard for reviewing the underlying jury verdict for rationality, with the record viewed in the light most favorable to the verdict, and with no particular deference to the trial judge, is of course a familiar one. It is the traditional review standard that this Court has articulated in criminal and civil litigation alike, both as a matter of constitutional law and in interpreting relevant procedural rules, where a litigant has an appeal of right from an adjudication that has visited upon him a deprivation of life, liberty or property. In reviewing the validity of both liability findings and penalty findings, appellate courts routinely engage in *de novo* review of the record to determine

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[4] Petitioners characterize the Eighth Circuit, by virtue of its *Big D* decision, as applying a standard of appellate review similar to the "intensive review" of both the jury's award and the district court's ruling used by the Third Circuit in its decision below. Pet. at 17. We disagree with this characterization. In our view, the Eighth Circuit's earlier decision in *Jacobs Mfg. Co.* demonstrates that the Eighth Circuit applies the standard used by the majority of circuits that have explicitly addressed the issue: *de novo* review of the district court's decision, applying a "rational factfinder" standard in deciding whether the record, viewed in the light most favorable to the verdict, rationally supports the jury's award. Further, the case cited in *Big D* to illustrate the nature of the *de novo* review being used, *see* 184 F.3d at 933, confirms the limited nature of this review. In that case, *Midland Banana & Tomato Co., Inc. v. United States Dep't of Agric.*, 104 F.3d 139, 142 (8th Cir.), *cert. denied*, 522 U.S. 951 (1997), the Eighth Circuit relied on the rule that "[w]e review federal constitutional questions de novo."

whether the deprivation is rationally sustainable on the record.

We briefly address this traditional review standard to highlight the broad base of support for the approach that most circuits have taken in assessing federal substantive due process challenges to punitive damage awards, and to highlight the importance of this Court granting review in this case to bring this area of the law into line with the traditional approach.

Criminal Liability. In criminal litigation, it is well settled that where a defendant tests the adequacy of the evidence introduced at trial, the proper test on appellate review (and on habeas review of state court proceedings) is whether "a rational factfinder" could have arrived at the result reached by the jury, in light of the underlying law, the facts, and the standard of proof. *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979). In *Jackson*, the Court stated that "[t]his familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts," thus "imping[ing] upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Id.* at 319.

In *Jackson*, this Court went out of its way to emphasize that the "rational factfinder" test is an objective one that focuses on the corpus of evidence that was before the jury, not on any individual aspects of how the jury performed its duty, or how the trial judge viewed the case. The standard, the Court stated, "does not permit a court to make its own subjective determination of guilt or innocence," nor does it concern "how rationally the verdict was actually reached" based on "scrutiny of the reasoning process actually used by the factfinder — if known." *Id.* at 319-20 n.13. This Court has consistently emphasized the narrow, objective character of the "rational factfinder" test in subsequent decisions involving the review of jury verdicts in criminal cases.[5]

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[5] Even before *Jackson*, in explicating the standard for reviewing evidentiary sufficiency objections in federal court, the Court stated that "[e]ven the trial court, which has heard the testimony of witnesses firsthand, is not to weigh the evidence or assess the credibility of witnesses when it

Civil Liability. *Jackson* involved the review of evidentiary sufficiency to sustain a criminal conviction. But a close variant of the *Jackson* standard applies as well to appellate review of liability determinations in federal court civil litigation. Here, too, there is no deference to district court determinations. This Court articulated the general approach decades ago as follows: "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict." *Brady v. Southern Ry.*, 320 U.S. 476, 479-80 (1943).

This Court explicitly introduced *Jackson*'s "rational factfinder" language in the summary judgment context in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), in stating that "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial,'" emphasizing that the inferences that may be drawn from the facts must be "'viewed in the light most favorable to'" the nonmovant. *Id.* at 587 (citations omitted). In civil litigation, the federal appellate courts now routinely refer to the "rationality" of a finding of liability when they engage in *de novo* review of the

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judges the merits of a motion for acquittal," and that "[o]bviously a federal appellate court applies no higher a standard." *Burks v. United States*, 437 U.S. 1, 16 (1978). In *Tibbs v. Florida*, 457 U.S. 31 (1982), the Court stated that the *Jackson* test "forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt," so that "[t]he Due Process Clause . . . sets a lower limit on an appellate court's definition of evidentiary sufficiency," but it emphasized that "the reviewing court must view 'the evidence in the light most favorable to the prosecution.'" *Id.* at 45 & n.21 (quoting *Jackson*, 443 U.S. at 319). This aspect of *Jackson* was also emphasized in *Herrera v. Collins*, 506 U.S. 390, 401-02 (1993). Most recently, in *Schlup v. Delo*, 513 U.S. 298, 330 (1995), the Court emphasized the objective nature of the *Jackson* "rational factfinder" test as follows: "Under *Jackson*, the question whether the trier of fact has power to make a finding of guilt requires a binary response: Either the trier of fact has power as a matter of law or it does not."

corpus of record evidence in reviewing summary judgment and JMOL rulings.[6]

Criminal Penalties. The "rational factfinder" standard also appears at the penalty stage in criminal proceedings. For example, in the capital punishment context, in deciding whether the record supports a finding of a particular death-qualifying "aggravating circumstance," the "appropriate standard of review is the 'rational factfinder' standard established in *Jackson*." *Lewis v. Jeffers*, 497 U.S. 764, 781 (1990). *See also id.* at 781-83; *Sawyer v. Whitley*, 505 U.S. 333, 339-41, 345-47 & n.14 (1992) (citing *Jackson* in reference to the "innocent of death" doctrine in the context of successive habeas claims). In a related vein, in reviewing whether

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[6] *See* David G. Knibb, *Federal Court of Appeals Manual* § 30.2, at 526 (4th ed. 2000). An electronic search of decisions in the past decade reveals that at least ten of the twelve federal circuit courts of appeals employ the "rational factfinder" test in their *de novo* review of summary judgment and/or JMOL rulings. *See, e.g.*, *Doby v. Decrescenzo*, 171 F.3d 858, 873-74 (3d Cir. 1999); *This is Me, Inc. v. Taylor*, 157 F.3d 139, 142 (2d Cir. 1998); *Tuohey v. Chicago Park Dist.*, 148 F.3d 735, 740 (7th Cir. 1998); *Davis v. United States Postal Serv.*, 142 F.3d 1334, 1341 (10th Cir. 1998); *Buntin v. Breathitt County Bd. of Educ.*, 134 F.3d 796, 800 (6th Cir. 1998); *Gremmels v. Tandy Corp.*, 120 F.3d 103, 105 (8th Cir. 1997); *Gambetta v. Prison Rehabilitative Indus. & Diversified Enters., Inc.*, 112 F.3d 1119, 1121 (11th Cir. 1997); *Pierce v. Atchison T. & S.F. Ry.*, 110 F.3d 431, 438 (7th Cir. 1997); *Goldhirsh Group, Inc. v. Alpert*, 107 F.3d 105, 107-08 (2d Cir. 1997); *Waymire v. Harris County*, 86 F.3d 424, 428 (5th Cir. 1996); *United States v. 121 Allen Place*, 75 F.3d 118, 120-21 (2d Cir. 1996); *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 187 (5th Cir. 1995); *Gulf South Medical & Surgical Inst. v. Aetna Life Ins. Co.*, 39 F.3d 520, 521 (5th Cir. 1994), *cert. denied*, 516 U.S. 814 (1995); *Favorito v. Pannell*, 27 F.3d 716, 719 (1st Cir. 1994); *Alvarez-Crespo v. Olavarria-Rivera*, 994 F.2d 35, 36 (1st Cir. 1993); *Smith v. American Nat'l Red Cross*, 1992 WL 357850, at *2 (4th Cir. 1992); *In re Wade*, 969 F.2d 241, 248 (7th Cir. 1992); *Premier Bank v. Mosbacher*, 959 F.2d 562, 566 (5th Cir. 1992); *Pitts v. Michael Miller Car Rental*, 942 F.2d 1067, 1069-70 (6th Cir. 1991); *T. Harris Young & Assocs., Inc. v. Marquette Electronics, Inc.*, 931 F.2d 816, 821, 828 (11th Cir.), *cert. denied*, 502 U.S. 1013 (1991); *Kraus v. Sobel Corrugated Containers, Inc.*, 915 F.2d 227, 229 (6th Cir. 1990); *In re Merritt Logan, Inc.*, 901 F.2d 349, 366 (3d Cir. 1990); *Taylor v. List*, 880 F.2d 1040, 1044-45 (9th Cir. 1989).

particular criminal sentences are in violation of the Eighth Amendment's ban on "cruel and unusual punishments," this Court treats the issue as "legal" in nature, reviewable *de novo*, with no particular deference to the trial court's view of the matter. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 961, 985-90, 994-96 (1991) (opinion of Scalia, J., joined by Rehnquist, C.J.); *id.* at 996, 1001-08 (opinion of Kennedy, J., joined by O'Connor and Souter, JJ.); *Solem v. Helm*, 463 U.S. 277, 283, 290-300, 303 (1983); *Rummel v. Estelle*, 445 U.S. 263, 275-82 (1980); *Gore v. United States*, 357 U.S. 386, 393 (1958); *Weems v. United States*, 217 U.S. 349, 362-68, 377, 380-82 (1910).[7] The Court has adopted a similar review standard with respect to criminal forfeitures. *United States v. Bajakajian*, 524 U.S. 321, 336-37 n.10 (1998).

Civil Penalties. In reviewing whether particular instances of civil fines are constitutionally excessive, this Court has likewise treated the issue as "legal" in nature and reviewable *de novo*, with no particular deference to the views of lower courts or administrative agencies concerning the ultimate constitutional issue of excessiveness. *See, e.g., St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915); *Missouri Pacific Ry. Co. v. Tucker*, 230 U.S. 340, 347, 349-51 (1913); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111-12 (1909). This Court relied on these decisions in explicating the standard for reviewing federal substantive due process attacks on punitive damage awards. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-

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[7] The federal circuit courts of appeal have understood that the review of Eighth Amendment challenges is to be conducted *de novo*. *See, e.g., United States v. Flowal*, 163 F.3d 956, 963 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 1509 (1999); *Windham v. Merkle*, 163 F.3d 1092, 1106 (9th Cir. 1998); *United States v. DeLuca*, 137 F.3d 24, 40 n.19 (1st Cir.), *cert. denied*, 119 S. Ct. 268 (1998); *Leslie v. Doyle*, 125 F.3d 1132, 1134 (7th Cir. 1997); *United States v. Quinn*, 123 F.3d 1415, 1425 (11th Cir. 1997), *cert. denied*, 523 U.S. 1012 (1998); *United States v. Angulo-Lopez*, 7 F.3d 1506, 1509-10 (10th Cir. 1993), *cert. denied*, 511 U.S. 1041 (1994).

54, 458 (1993) (plurality opinion); *Pacific Mutual Life Ins. Co. v. Haslip*, 400 U.S. 1, 12, 18 (1991).

Punitive Damages. The "rational factfinder" standard that is employed by most of the federal circuit courts of appeal that have articulated a review standard likewise finds solid support in this Court's decisions during the past decade addressing federal substantive due process challenges to punitive damage awards. In all three cases, the Court treated the "gross excessiveness" issue as a "legal" one, reviewable *de novo* with the record viewed in the light most favorable to the jury's verdict, with no particular deference to the views of the district court. *See BMW v. Gore*, 517 U.S. at 574-86; *TXO*, 509 U.S. at 458-62 (plurality opinion); *Haslip*, 400 U.S. at 18-24. Further, in a decision holding that some degree of judicial review of the size of punitive damage awards is required by the Due Process Clause of the Fourteenth Amendment, this Court strongly implied that *Jackson*'s "rational factfinder" approach is the appropriate review standard for "gross excessiveness" claims. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 & n.10 (1994) (citing *Jackson*).

B. The Eleventh Circuit Improperly Defers to "Factual" Findings Made by District Courts in Reviewing Jury Verdicts, Carrying With It the Twin Risks of Undue Interference With Rational Jury Verdicts, and the Approval of Irrational Jury Verdicts

We agree with petitioners that the Eleventh Circuit applies a standard for appellate review of punitive damage awards that is at odds that the standard followed in other circuits. *See* Pet. at 15-16. However, we differ from petitioners in our description of how this standard operates. By and large, the Eleventh Circuit appears to follow the "rational factfinder" approach used by most circuits, treating the issue of whether a particular punitive damage award violates federal substantive due process as a "legal" issue subject to *de novo* review. But unlike other circuits, the Eleventh Circuit disclaims any "abuse of discretion" label, thus making clearer than other circuits that, in general, a *de novo* review standard applies. Thus, in *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320

(11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999), the court stated that under this Court's decisions

> there is a constitutional limit on a punitive damage award beyond which neither the jury nor the court has any discretion to venture. The abuse of discretion standard is inapplicable where no discretion may be exercised.
>
> The ultimate question whether a punitive damage award is constitutionally excessive is, of course, a legal issue. We review questions of law *de novo*.

Id. at 1334.

Up to this point, the Eleventh Circuit's *Johansen* decision is straightforward, with the court endorsing *de novo* review of a jury verdict awarding punitive damages, conducted through a review of the underlying record viewed in the light most favorable to the verdict, without deference to the district court. But the court then adds a caveat that creates a curious hybrid standard of review: rather than deferring on factual matters to the *factfinder* on the case, that is, the jury, the Eleventh Circuit defers to the posttrial analysis of the *district court* that reviewed the jury's verdict, "accept[ing] the district court's findings of fact unless they are clearly erroneous" within the meaning of Fed. R. Civ. P. 52(a). *Id.*

We are aware of no authority for such a standard of review. The only case cited by the Eleventh Circuit on this point is this Court's decision in *United States v. Bajakajian*, 524 U.S. 321 (1998), in which the Court conducted an excessiveness analysis of a criminal forfeiture imposed by a district court after a bench trial and confirmed the basic rule that although excessiveness determinations are "legal" issues reviewed *de novo*, the evidence must be viewed in the light most favorable to the result reached by the factfinder — there, the district court that conducted the bench trial and issued Rule 52(a) factual findings. *Id.* at 336-37 n.10. We are at a loss to understand how *Bajakajian* could be construed to support the proposition that if a district court issues an opinion on a posttrial motion finding that a jury's award of punitive damages violates federal substantive due process, on appeal there will no longer be "rational factfinder" review of whether the record before

the jury supports the ultimate verdict, but instead the district court's opinion will be given the status of Rule 52(a) factual findings — thereby rendering irrelevant the fact that it is a jury verdict, not a bench trial finding, undergoing review.

Apart from the conceptual inappropriateness of the Eleventh Circuit's mixing of two separate appellate review standards — that used to assess the rationality of a jury's verdict, and that used to assess the validity of explicit factual findings made at the conclusion of a bench trial — this approach creates twin risks of aberrant results. Under the "rational factfinder" review standard used by most circuits, either the jury's punitive damage award is rational, in which case it is upheld, or it is not rational, in which case it is struck down. *Cf. Schlup v. Delo*, 513 U.S. 298, 330 (1995) (stating that under the *Jackson* test, the question of whether the jury's verdict could have been reached by a rational factfinder "requires a binary response"). Under this approach, there is no risk of undue interference with jury verdicts (as *only* irrational jury verdicts are struck down) and no risk of the approval of irrational jury verdicts (as *all* irrational jury verdicts are struck down).[8]

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[8] We hasten to add that this *de novo* standard of review, which ensures that all irrational verdicts are struck down on federal substantive due process grounds, but that no rational verdicts are struck down on such grounds, is relevant in only a tiny percentage of cases, and that this standard does not place trial judges in a legal straightjacket. The vast bulk of jury verdicts raise no colorable excessiveness concern. Further, as a practical matter, most verdicts that are constitutionally problematic are reduced by trial judges in the exercise of an entirely different source of power to control aberrant verdicts. Throughout our nation's history, federal trial judges have enjoyed broad authority to grant new trials, both as to liability and damages, through the exercise of their power to sit as the "thirteenth juror," weighing the evidence to decide whether a new trial is in the interests of justice. As we have argued at length elsewhere, this power of the trial judge to alter jury verdicts based on a weight-of-the-evidence analysis is exclusive to trial judges and is effectively immune from control by appellate courts. *See* Brief of Federal Jurisdiction and Legal History Scholars Akhil Reed Amar, et al., as *Amici Curiae* in Support of Petitioner, in *Gasperni v. Center for Humanities*, No. 95-719 (filed March 1, 1996) (hereinafter "*Gasperni Amicus* Br.").

The Eleventh Circuit's approach creates a risk of approval of irrational jury verdicts: even where the appellate court on *de novo* review would conclude that the result reached by the jury is irrational and hence in violation of federal substantive due process, the verdict can nonetheless be upheld on the basis of factual findings made by the district court, to which the appellate court will defer. This approach also creates the opposite risk of undue interference with rational jury verdicts: even where the appellate court on *de novo* review would conclude that the result reached by the jury is rational, the district court can make factual findings striking down the verdict, to which the appellate court will also defer.

Even in the context of federal court habeas review of the sufficiency of the evidence to support state court convictions, this Court has not permitted anomalous results such as these. In *Wright v. West*, 505 U.S. 277 (1992), the Court turned back a request that federal courts give sufficiency-of-the-evidence findings of state trial judges deferential as opposed to plenary review.[9] We see no basis for a different rule on direct appellate review in federal court of the rationality of the result of civil litigation, as this Court's decisions in the summary judgment and JMOL contexts illustrate. Thus, apart from the absence of any jurisprudential pedigree for the Eleventh Circuit's hybrid review standard, the use of the standard raises troublesome concerns of practicality and fairness that merit consideration in the context of the instant case. (The petition for certiorari in *Johansen*, which this Court denied, did not raise any the standard-of-review issue. *See* Pet. at 16 n.9.)

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[9] *See* 505 U.S. at 297, 303, 305 (O'Connor, J., joined by Blackmun and Stevens, JJ., concurring in the judgment) (endorsing traditional *de novo* review standard and affirming based on *de novo* review of petitioner's *Jackson* claim); *id.* at 306, 309 (Kennedy, J., concurring in the judgment) (same); *id.* at 297 (White, J., concurring in the judgment) (affirming based on *de novo* review of *Jackson* claim); *id.* at 287-97 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J.) (noting arguments for using, at least in some contexts, a deferential review standard, but affirming on ground that petitioner's *Jackson* claim failed even on *de novo* review); *id.* at 310 & n.1 (Souter, J., concurring in the judgment) (affirming on the ground that petitioner's habeas claim was time barred).

C. The Third Circuit Improperly Employs "Intensive Review," in Violation of Both Statutory and Seventh Amendment Strictures on the Scope of Federal Appellate Review of Jury Verdicts

The appellate review standard applied by the Third Circuit in its decision below is even more aberrant and in conflict with fundamental strictures on the scope of appellate review than the Eleventh Circuit's approach. Unlike most circuits, which defer to juries under the "rational factfinder" standard, and unlike the Eleventh Circuit, which defers to district courts on factual aspects of posttrial rulings that are not "clearly erroneous," the Third Circuit exhibits little if any deference to *either* the jury *or* the district court in evaluating federal substantive due process attacks on jury-awarded punitive damages. According to the Third Circuit, it has chosen to take on what it terms a "challenging" role: "[t]he role of gatekeeper" over sizable punitive damage awards. Pet. App. 3a. Stating that this "is not an enviable task," the court reports that it has "searched vainly in the case law for a formula" with which to pass on such attacks but has "not found one." Pet. App. 41a. In deciding the upper limit of punitive damages in each case, the court indicates, each of its panels "must rely on its combined experience and judgment" and, when its members disagree, "they must seek an accommodation among their views" concerning what is "the proper, reasonable punitive damages award." *Id.* Such "intensive review" of punitive damage awards, the court believes, is required by this Court's jurisprudence. Pet. App. 44a.

We agree with petitioners that the standard of review that has been adopted by the Third Circuit is in conflict with the standard used in other circuits and finds no support in this Court's jurisprudence, and that certiorari should be granted in this case to set forth a uniform standard of review. *See* Pet. at 17-20. Further, in evaluating the Third Circuit's standard, we urge the Court to consider the way in which this standard violates fundamental strictures on the scope of federal appellate review of jury verdicts.

Based on the Third Circuit's description of its standard of review and on the way it applied that standard to the facts of the case below, *see* Pet. App. 38a-41a, it is apparent that the Third

Circuit engaged in weight-of-the-evidence review — perhaps even *de novo* review — of the *factual* issue of what is the "proper" or "reasonable" amount of punitive damages in this case. As we and others explained in an *amicus* brief filed in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), this form of federal appellate review is entirely improper. *See Gasperini Amicus* Br., *supra* note 8. Appellate weight-of-the-evidence or *de novo* review of factual issues has been barred by statute since the enactment of the Judiciary Act of 1789, § 22, 1 Stat. 84-85, to the present day, *id.* at 22-24, a statutory structure which is both compatible with basic fairness to litigants and which promotes efficiency. *Id.* at 24-30. Even more fundamentally, this sort of "intensive review" practiced by the Third Circuit has been barred by the Re-Examination Clause of the Seventh Amendment since the enactment of the Bill of Rights in 1791. *Id.* at 4-21. As we have argued previously:

> This Court has repeatedly held that the question of the adequacy of the evidence to support a damage award is "purely a question of fact," not a legal issue. Weight-of-the-evidence review simply gives an appellate court the opportunity to substitute *its* view of the evidence for that of the jury, not to correct any kind of defect in the proceeding. By definition, the award is one that a rational jury could reasonably have imposed; its only "flaw" is that a federal appellate court disagrees with it.

Id. at 19 (quoting *Metropolitan R.R. v. Moore*, 121 U.S. 558, 574 (1887), and citing *St. Louis, Iron Mountain & S. Ry. v. Craft*, 237 U.S. 648, 661 (1915)).

In *Gasperini*, the Members of this Court disagreed over whether the constraints of a New York tort-reform statute governing damages could reasonably be construed as imposing a substantive legal limit on damages (that is, although not a preset cap, what amounted to a "soft cap" dependent in part on the facts of the case) that could be applied by the district court, followed by appellate review for "legal" error, under an abuse-of-discretion standard. But as we read the *Gasperini* opinions, no Member of the Court disputed that the Seventh Amendment bars a federal

appellate court from engaging in weight-of-the-evidence review.[10] The dispute in *Gasperini* was simply over whether the New York statute should be viewed by federal district courts as imposing a "soft cap," with federal appellate courts properly policing the outer boundaries of district court rulings applying this cap, or whether instead such a framework for review would invariably draw federal appellate courts into the prohibited enterprise of engaging in weight-of-the-evidence second guessing of jury verdicts.

Under *Gasperini*, we submit, the invalidity under the Seventh Amendment of the "intensive review" standard used by the Third Circuit is clear. By contrast, it would appear, especially in light of *Gasperini*, that the "rational factfinder" standard of review for punitive damages followed by most circuits is compatible with the Seventh Amendment. Thus, in our *amicus* brief in *Gasperini* we confined our argument to a demonstration of the impermissibility of any weight-of-the-evidence review in civil cases by federal appellate courts, raising no question as to "whether federal appellate courts have the power to review the arguably legal question of a damage award's compliance with the substantive due process 'reasonableness' standard." *Gasperni Amicus* Br. at 20 & n.19 (citing *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994), and *Southern Ry. v. Bennett*, 233 U.S. 80, 87 (1914) (Holmes, J.)).

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[10] *See Gasperini*, 518 U.S. at 434-38 (opinion of the Court) (viewing New York statute as imposing substantive cap, applicable in district court and therefore reviewable on appeal); *id* at 442-47 (Stevens, J., dissenting) (viewing New York statute as prescribing "an objective, legal limitation on damages" with the district court's analysis and therefore reviewable on appeal as a matter of law); *id.* at 448-50, 460-469 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (viewing any appellate application of the New York statute as requiring weight-of-the-evidence review that is prohibited by the Seventh Amendment).

CONCLUSION

This Court should grant the petition for certiorari to resolve the important conflict in the circuits over the proper standard of review for federal substantive due process attacks on jury-awarded punitive damages.[11]

Respectfully submitted.

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[11] Although we have not canvassed the case law regarding the appellate review standards being used in the state courts, it appears that the approach followed in state courts is far from uniform. Petitioners cite decisions from Kentucky and Wisconsin indicating that the appellate courts of those states view the issue of whether a punitive damage award is constitutionally excessive as factual in nature, with trial court decisions reviewable only under the "clearly erroneous" or "abuse of discretion" standard for factual issues. Pet. at 15 n.8 (citing *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 415 (Ky. 1998); *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 557 N.W.2d 67, 81 (Wis. 1996)). By contrast, in a recent decision upholding a punitive damage award against an objection that the trial court had not issued findings of fact and conclusions of law in rejecting defendant's federal constitutional challenge, an Oregon appellate court answered the objection by stating that "because the constitutional issue is purely a legal issue, the trial court's reasoning in support of its decision, while helpful, has no direct bearing on our review." *Axen v. American Home Prods. Corp ex rel. Wyeth-Ayerst Labs.*, 974 P.2d 224, 241 (Or. App. 1999) (citation omitted), *petition for cert. filed*, No. 99-784 (Nov. 4, 1999).

APPENDIX

QUALIFICATIONS OF *AMICI CURIAE*

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No. 99-687

In The Supreme Court of the United States

ORTHOFIX S.R.L., INTER MEDICAL SUPPLIES LIMITED, AND ORTHOFIX INC.,
Petitioners,

v.

EBI MEDICAL SYSTEMS, INC., ELECTRO-BIOLOGY, INC., AND BIOMET, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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EBI devotes the first ten pages of its brief in opposition (Opp. 2-10) to telling this Court the same story it told the jury at trial—in the hope, apparently, that this Court will conclude that EBI does not deserve to be held liable for punitive damages. EBI's trial story, however, is flatly inconsistent with the facts of record in this case (*see* Orthofix's C.A. Br. 2-13); with the jury's Special Verdict, which found EBI liable for breaching three contracts and committing eight business torts (*see* Pet. App. 113a-22a); and with the firmly established rule that the evidence must be construed in support of the jury's verdict (*see Patrick v. Burget*, 486 U.S. 94, 98 n.3 (1988)). As the case comes to this Court, therefore, it is established that EBI acted with "actual malice" or "wanton and willful disregard of persons who foreseeably might be harmed" (Pet. App. 117a); that "the full [compensatory damages] award [of $48 million] is properly attributable to the tortious conduct" (Pet. App. 31a); and that EBI obtained $98 million in profits as a result of its unlawful conduct (Pet. App. 101a, 105-06a; App., *infra*, 2a-5a).

In the balance of its brief in opposition, EBI does not dispute that the three questions presented in the petition are worthy of this Court's review—if the lower courts are divided. It argues only (Opp. 11-24) that they are not and (with respect to the third question) that Orthofix waived its constitutional right to a new jury trial. EBI thus opposes this Court's review on exceedingly narrow grounds. This reply demonstrates that EBI is wrong on those grounds. Accordingly, the Court should grant the petition and resolve now the urgent questions that have arisen in the three years since it decided *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

I. STANDARD OF APPELLATE REVIEW

A. The petition (Pet. 14-15) explains that the decision of the Third Circuit conflicts with decisions of the Second and Ninth Circuits. EBI disagrees. Although EBI does not dispute that the Third Circuit applied an "intensive"

de novo standard of appellate review while the Second and Ninth Circuits applied an abuse-of-discretion standard, it insists that the courts were reviewing different things. *See* Opp. 12-13. Specifically, EBI says that the Third Circuit reviewed what it calls a "constitutional maximum determination" (Opp. 15) while the Second and Ninth Circuits reviewed a common-law "excessiveness" determination (Opp. 12). That is false.

The Second Circuit in *Lee v. Edwards,* 101 F.3d 805 (1996), determined the maximum constitutional level of the award, just as the Third Circuit did below. The Second Circuit set the maximum "punitive damage award of $75,000" and it did so in "light of the *Gore* factors." 101 F.3d at 813. Indeed, the Second Circuit spent five single-spaced pages applying the three *Gore* guideposts. *See id.* at 809-13.

Likewise, the Ninth Circuit in *Pavon v. Swift Transportation Co.*, 192 F.3d 902 (1999), adjudicated a "constitutional-maximum determination." It considered whether the punitive damages award in that case was excessive under the three *Gore* guideposts (*id.* at 909-10) and concluded that the constitutional maximum had not been exceeded because "*[t]he trial court did not abuse its discretion* in finding that this behavior was reprehensible enough to support the punitive damages awarded" (*id.* at 909 (emphasis added)). Accordingly, the standard of appellate review applied by the Third Circuit to "constitutional maximum determinations" conflicts directly with that applied by the Second and Ninth Circuits.

Furthermore, as explained in our petition (Pet. 15-16), the Third Circuit's decision also conflicts with the Eleventh Circuit's decision in *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), *cert. denied,* 68 U.S.L.W. 3244 (U.S. Oct. 12, 1999) (No. 99-252). The Eleventh Circuit applies a hybrid standard under which the ultimate excessiveness determination is

reviewed *de novo*, but reprehensibility findings receive deference. *See* 170 F.3d at 1335. EBI contends that the appeal in this case would have come out the same in the Eleventh Circuit and states that that court "reduced an award despite specific jury findings of bad intent." Opp. 15. That, too, is false. The Eleventh Circuit did *not* reduce the punitive damages award; it instead affirmed the district court's remittitur, even though the remitted award was 100 times the amount of compensatory damages. Unlike the Third Circuit, the Eleventh Circuit deferred to the district court's reprehensibility determination (170 F.3d at 1336) and its assessment of the amount of punitive damages such reprehensible conduct merited (*see id.* at 1339). Thus, as *Amici Curiae* Professors Erwin Chemerinsky and Arthur F. McEvoy conclude, the Eleventh Circuit's and Third Circuit's standards conflict: "[t]he appellate review standard applied by the Third Circuit in its decision below is even more aberrant and in conflict with the fundamental strictures on the scope of appellate review than the Eleventh Circuit's approach." Brief of Erwin Chemerinsky and Arthur F. McEvoy as *Amici Curiae* in Support of Petitioners 16.

B. The petition (Pet. 17-18) also explains that the Third Circuit's decision is in tension with this Court's decisions in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279-80 (1989), and *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 438-39 (1996). Again, EBI does not dispute that this Court applied an abuse-of-discretion standard in those cases and that the Third Circuit applied a *de novo* standard of review here. EBI contends only that the courts reviewed different things.

EBI's contention rests on a series of purported distinctions—none of which has any significance for the standard of appellate review. EBI observes that *"Gasperini* and *Browning-Ferris* both involved only Rule 59(a) excessive-

ness assessments." Opp. 14. But excessiveness assessments almost always arise on motions for new trial under Federal Rule of Civil Procedure 59(a). Excessiveness challenges cannot arise on motions for judgment as a matter of law under Rule 50, because such motions must be made "before submission of the case to the jury" (FED. R. CIV. P. 50(a)(2)) and a defendant cannot challenge as excessive a verdict that has not yet been rendered.[1] Indeed, EBI necessarily brought its own excessiveness challenge by new-trial motion under Rule 59(a), because it did not move for judgment as a matter of law on excessiveness under Rule 50 at trial (*see* C.A. App. 1376-1406), and did not move to alter or amend the judgment after trial under Rule 59(e) (*see* C.A. App. 1407-55).[2]

Nor can EBI distinguish *Browning-Ferris* and *Gasperini* (or any other excessiveness case, for that matter) from a due process challenge to a punitive damages award by labeling the former an "excessiveness" determination and the latter a "constitutional-maximum determination." Opp. 15. In adjudicating an excessiveness challenge, a reviewing court is free to state the maximum permissible award (and order the plaintiff to remit the excess or retry

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1 Although motions for judgment as a matter of law may be "renewe[d]" after entry of judgment (FED. R. CIV. P. 50(b)), "[a] post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion" "to avoid any question arising under the Seventh Amendment." FED. R. CIV. P. 50(b) advisory committee's note (1991).

2 Contrary to EBI's suggestion (Opp. 12 n.6), it does not appear that an excessiveness challenge can be made by a motion to alter or amend judgment under Rule 59(e). *See* JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 12.5, at 572 (2d ed. 1993) ("[A] motion to alter the judgment" cannot involve "a reduction in an award."). Even if it could, however, "the standard of reviewing an order on a motion to alter or amend a judgment is relatively well settled. The district court judge's decision granting or denying a Rule 59(e) motion is reviewed for abuse of discretion." 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2818, at 197-98 (2d ed. 1995).

its case) or alternatively to state that the award is excessive (and order the district court to determine the appropriate remittitur on remand). The "constitutional" nature of a *Gore* challenge does not limit a court to the former remedy—*i.e.*, a "maximum determination." Indeed, in *Gore* itself this Court decided only that "the grossly excessive award imposed in this case transcends the constitutional limit" and remanded to the state court to determine "the appropriate remedy." 517 U.S. at 585-86.

The *only* difference between the excessiveness determination by the Third Circuit below and by this Court in *Browning-Ferris* and *Gasperini* is the substantive law by which excessiveness is measured: the Due Process Clause (Third Circuit), state common law (*Browning-Ferris*), and state statute (*Gasperini*). EBI offers no reason why the standard of appellate review should turn on the source of the substantive-law yardstick for excessiveness. All are "law." That the federal Constitution is the "supreme Law of the Land" (U.S. CONST. Art. VI) does not make questions arising under it any more "legal"—or any more susceptible of *de novo* review—than those arising under state common law or a statute enacted by a state legislature. What is more, that the Constitution supplies the measure of excessiveness does not make any less applicable the reasons this Court gave for reviewing excessiveness challenges arising under state common law and state statute for abuse of discretion—namely, long-standing historical practice, the "limited function" of federal appellate courts, and "the strictures of the Seventh Amendment." *Browning-Ferris*, 492 U.S. at 280 n.26; *Gasperini*, 518 U.S. at 438.[3] The Second and Ninth Circuits agree that the standard of appellate review does not turn on the

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[3] By contrast (Opp. 17-18), those considerations are inapplicable to judicially assessed criminal forfeitures (*see United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998)) and magistrates' Fourth Amendment probable-cause determinations (*see Ornelas v. United States*, 517 U.S. 690, 697 (1996)).

source of the law by which excessiveness is measured. The former circuit reviews "constitutional maximum determinations" for abuse of discretion on the authority of this Court's decision in *Gasperini*. *See* 101 F.3d at 808-09. The latter circuit does the same on the authority of this Court's decision in *Browning-Ferris*. *See* 192 F.3d at 909.

In sum, EBI cannot reconcile the Third Circuit's "intensive" *de novo* standard of review with the abuse-of-discretion standard of review adopted by the Second Circuit, the Ninth Circuit, and this Court.[4] For the reasons stated in our petition (Pet. 18-20), which EBI does not dispute, that conflict merits this Court's review.[5]

II. CONSTITUTIONALITY OF LOW-RATIO PUNITIVE DAMAGES AWARDS THAT REQUIRE DEFENDANTS TO DISGORGE THE PROFITS OF THEIR UNLAWFUL CONDUCT

A. Constitutionality Of Low-Ratio Punitive Damages Awards

The petition (Pet. 21-22 & nn.11-12) brought to this Court's attention the recent empirical evidence that high- and low-ratio punitive damages awards have increased

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[4] That conflict did not exist at the time this Court denied the petition for a writ of certiorari in *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997). *See* Opp. 16 n.7.

[5] Contrary to EBI's attempted preemptive strike (Opp. 11), if the Court grants review, it will have before it not only the standard of appellate review, but also the antecedent substantive standard. This case thus allows the Court to decide the question it reserved in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994)—namely, whether the Due Process Clause is satisfied by review of the jury's award for rationality similar to the review required by *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979). As *Amici Curiae* Professors Chemerinsky and McEvoy point out (Br. 2-3, 12-18), the lower courts are divided on that standard as well. The Third Circuit's "intensive" *de novo* review is not consistent with rational-fact-finder review. *See id.* at 16-18.

after *Gore* and that a growing number of courts are striking down low-ratio awards. That evidence should trouble the Court because it suggests that *Gore* may be having the exact opposite of the effect intended: judicial intervention is increasing disparities by increasing the incidence of high- and low-ratio awards.

Ironically, the increasing disparities are even more disturbing in low-ratio awards than in high-ratio awards. The latter suggests that some portion of the problem that drew the Court into substantive-due-process review of punitive damages awards remains. The former suggests that courts are using *Gore* in *Lochner*-like fashion to reduce low-ratio awards with which they disagree. As intimated in the petition (Pet. 24-25), if the decision below is left undisturbed, its reduction of a punitive damages award from a ratio of 1:1 to the actual damages to a ratio of .02:1 will stand as precedent for as-applied challenges to antitrust and other multiple damages statutes in future cases. *See* App., *infra*, at 1a (listing statutes).

EBI takes no issue with our understanding of the problem or its importance. EBI states only that the disparities are a necessary result of *Gore*. *See* Opp. 18-19. That is a merits point and can be taken up if this Court grants plenary review. For now, it suffices to note that constitutionally based reductions of low-ratio awards are flatly inconsistent with the "fair notice" rationale of *Gore*.[6]

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[6] Although EBI is correct (Opp. 18) that this Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula" (*Gore*, 517 U.S. at 582), that line is the maximum amount of punitive damages the Due Process Clause would allow, not the minimum. This Court predicated its due-process analysis on "[e]lementary notions of fairness" that a person receive notice of the "severity of the penalty that a State may impose" (*id.* at 574) and cited numerous laws extending back to 1275 that gave notice of "double, treble, or quadruple damages" (*id.* at 581). From that reasoning it follows that a defendant has fair notice as a matter of law of a punitive damages award that is equal to the amount of compensatory damages, as was the case here.

B. Constitutionality Of Punitive Damages Awards That Require Defendants To Disgorge The Profits Of Their Unlawful Conduct

EBI argues that "[n]o issue as to the role of a defendant's profits is presented by the Third Circuit's decision," because neither "the district court [n]or the jury accepted [Orthofix's unjust enrichment] evidence"; moreover, the jury must have "*rejected*" that evidence because there is "nothing to indicate" that Orthofix's lost profits should differ from EBI's unjust enrichment. Opp. 20 (emphasis in original). EBI's recitation of the record is demonstrably wrong.

At trial, EBI did not dispute Orthofix's unjust enrichment evidence. EBI's trial strategy was to admit the value of Orthofix's U.S. market (to be consistent with the damages theory on its counterclaim for the loss of its Orthofix "franchise" under the New Jersey Franchise Practices Act) and to dispute that Orthofix's new sales force could retain all of its customers. *See* Pet. 4 n.2. As a result, the parties did not dispute the $97.7 million unjust enrichment figure. *See id.* & App., *infra*, at 2a-5a. The jury could not help but accept Orthofix's unjust enrichment evidence, since there was no contrary testimony. The district court relied on that evidence (Pet. App. 101a, 105a-06a) as the principled basis on which to remit the punitive damages award to $50 million, which provided a total award of $98 million and removed EBI's unjust enrichment. The fact that the jury did not award the full amount of Orthofix's lost profits shows only that it believed Orthofix would not have been able to retain its entire U.S. market, not that that market (unjustly obtained by EBI) was worth less than $98 million.

The Third Circuit's refusal to affirm the punitive damages award and deprive EBI of the profits obtained from its unlawful conduct conflicts in principle with this Court's decisions in *Pacific Mutual Life Insurance Co. v. Haslip*,

499 U.S. 1, 22 (1991), and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 461-62 (1993) (Pet. 26); conflicts with decisions of other federal courts and state supreme courts (Pet. 26 n.16); effectively invalidates the unjust enrichment element in the tort reform statutes of New Jersey and eight other states (Pet. 26-27 and App., *infra*, at 6a-7a); and undercuts an essential deterrent to malicious conduct (Pet. 27). EBI does not dispute that analysis.

III. REDUCTION OF CONSTITUTIONALLY EXCESSIVE AWARDS WITHOUT OFFERING THE PLAINTIFF THE OPTION OF A NEW TRIAL

A. EBI's contention that Orthofix waived its constitutional right to a new trial, in reliance on generic "pressed or passed on" cases (Opp. 21-22), ignores this Court's dispositive decision in *Hetzel v. Prince William County*, 523 U.S. 208, 118 S. Ct. 1210, 1211 n.2 (1998) (per curiam). There, respondent argued (more reasonably than EBI here) that petitioner should have raised the Seventh Amendment question in her prior certiorari petition (as Orthofix has done here), rather than in a new-trial motion on remand in the district court. *See id.* This Court rejected respondent's argument. It held that petitioner did not have to anticipate that she would be denied "the option of a new trial" because that "would require petitioner to assume a deviation from normal practice and an action by the Court of Appeals that at minimum implicated constitutional concerns." *Id.*

So too, here, Orthofix could not have been expected to anticipate that the Third Circuit would order a reduction in punitive damages without offering it a new trial. The district court held that it could not "merely order a reduction in the award" and offered Orthofix a new trial on punitive damages. Pet. App. 106a. On appeal, EBI never suggested that the remitted award could be reduced without offering Orthofix a new trial. Indeed, EBI never

asked for a reduced award, but instead argued that it should be "vacated or, at a minimum, remanded for a new trial." Opp. 8 (quoting EBI's C.A. Br. 39). Orthofix's preservation of its constitutional right to a new jury trial follows *a fortiori* from *Hetzel*.

B. EBI's argument (Opp. 22-23) that the decision below complies with *Hetzel* rests on the same non-distinction between "traditional common-law excessiveness determinations" and constitutional-maximum determinations. Moreover, its argument that "[t]here is no intercircuit conflict" (Opp. 23) is not correct. The Eleventh Circuit in *Johansen* candidly admitted the conflict when it explained that the Second and Tenth Circuits "have recently decided to continue to offer the plaintiff, whose verdict has been found to be *constitutionally excessive*, a choice between a reduced verdict and a new trial to 'avoid any conflict with the Seventh Amendment.'" 170 F.3d at 1332 (emphasis added; quoting *Continental Trend Resources Inc.*, 101 F.3d at 643).[7]

CONCLUSION

For the foregoing reasons and those stated in our petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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December 2, 1999

[7] EBI reads the same passage to say that the new trial offer was merely "preferable." Opp. 23. EBI fails to disclose that the Tenth Circuit preferred that course to "avoid any conflict with the Seventh Amendment." 101 F.3d at 643.

APPENDICES

APPENDIX A

SELECTED FEDERAL STATUTES THAT MULTIPLY THE AWARD OF COMPENSATORY DAMAGES

National Housing Act, 12 U.S.C. § 1715z-4a(c) (authorizing double damages for unauthorized use of multifamily housing project assets and income).

Clayton Act, 15 U.S.C. § 15 (mandating treble damages for violation of antitrust laws).

Lanham Trademark Act, 15 U.S.C. § 1117 (mandating treble damages for intentional trademark infringement).

Copyright Act, 17 U.S.C. § 1203 (authorizing treble damages for repeated circumvention or violation of copyright protection systems).

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 (mandating that injured person recover treble damages).

Indian Arts and Crafts Act of 1990, 25 U.S.C. § 305e (a)(2)(A) (authorizing treble damages for misidentification of Indian produced goods).

False Claims Act, 31 U.S.C. § 3729 (mandating treble damages for false claims against the United States).

Patent Act, 35 U.S.C. § 284 (authorizing up to treble damages for patent infringement).

APPENDIX B

EXCERPTS FROM TRIAL TRANSCRIPT ON EBI'S PROFITS FROM ITS UNLAWFUL CONDUCT

Testimony of Orthofix's damages expert, Creighton Hoffman, during Orthofix's case in chief, 5/21/97 Tr. 1280:5-11 (C.A. App. 726):

THE WITNESS [MR. HOFFMAN]: Okay, I basically computed the damages two different ways. I've looked at unjust enrichment and I've looked at the—and basically unjust enrichment, I mean the additional profits that EBI Biomet made as a result of the actions that have been alleged here. And I've calculated unjust enrichment as being approximately 97 million dollars.

For the full explanation of the methodology used by Orthofix's damages expert to calculate EBI's unjust enrichment, see the testimony of Creighton Hoffman during Orthofix's case in chief, 5/21/97 Tr. 1301:18-1311:14 and PX-480 to 485 and PX-488 (C.A. App. 747-57).

Further testimony of Creighton Hoffman during Orthofix's case in chief, 5/21/97 Tr. 1313:10-18 (C.A. App. 759):

BY MR. MARZEN:

Q. Mr. Hoffman, before lunch I asked you about the amount by which EBI had been—has been unjustly enriched. Do you remember that?

A. That's correct. That's what these charts were intended to show.

Q. And the amount itself is on the summary of damages chart and it's in round numbers about, 98 million dollars?

A. Absolutely, 97.7 million dollars.

Testimony of Orthofix's damages expert, Creighton Hoffman, during Orthofix's rebuttal case, 5/21/97 Tr. 4525:3-9 (C.A. App. 1068):

[MR. HOFFMAN:] I then stepped back and did a wholly separate calculation to determine how much EBI had been enriched as a result of that, how big a stack of chips did they have on their side of the table, that really shouldn't be there if they had not done the things that had been alleged. And that came to just a little bit less than 98 million dollars, as I recall the numbers.

Further testimony of Creighton Hoffman during Orthofix's rebuttal case, 5/21/97 Tr. 4533:4-10 (C.A. App. 1785):

Q. [BY MR. MARZEN:] Mr. Hoffman, does Mr. Malackowski [EBI's damages expert] suggest similar adjustments to your 98 million dollars unjust enrichment figure?

A. [BY MR. HOFFMAN:] No, there was no similar sort of chart or table put forward yesterday, or I've got Mr. Malackowski's trial book with all of his exhibits, and there was nothing like this that deals with the unjust enrichment, the 97 million.

Further testimony of Creighton Hoffman during Orthofix's rebuttal case, 5/22/97 Tr. 4581:10-16 (C.A. App. 1824):

Q. [BY MR. MARZEN:] Can we turn now from a discussion of lost profits back to unjust enrichment. Is it your testimony, Mr. Hoffman, that, or your understanding that Mr. Malackowski does not really disagree with your calculation of unjust enrichment? And by that I mean the 98 million dollar figure?

A. [BY MR. HOFFMAN:] He made no adjustment to my 98 million dollar figure at all in his book or in his testimony.

The district court's ruling on counsels' reference to the unjust enrichment testimony in summation, 5/23/97 Tr. 4787:23-25 (C.A. App. 1122-23):

THE COURT: Well, I am going to rule that the verbiage, the term unjust enrichment will not be pronounced in front of the jury. You may comment upon the evidence that was presented with respect to how those figures or those calculations bear upon the question of lost profits, and obviously you may comment upon lost profits or the profitability of the defendants' conduct with respect to the punitive damage claim. But you may not use the words unjust enrichment.

And I will tell the jury, I will instruct the jury without identifying what the issues are, I will tell the jury that certain issues are going to be decided by the Court and that they need not be concerned about them, and they need not speculate upon what they are. I will not identify the issues before the jury.

Summation by Orthofix's counsel, 5/28/97 Tr. 5259: 1-11 (C.A. App. 1176):

But there are a couple of interesting things about Mr. Malackowski. He does not criticize this lost profit, this EBI profit number. He raised some issues about whether some of it's past and some of it's future, but he did not try to break that number apart and show you problems with that number, he only criticized this number [Orthofix's lost profits]. And that's because Mr. Malackowski recognizes that a business that's generating 25 to 30 million dollars a year in sales is worth 98 million dollars. That's the figure. That is the benefit that EBI has enjoyed as a result of this illegal activity.

Rebuttal summation by Orthofix's counsel, 5/29/97 Tr. 5350:25-5351:2 (C.A. App. 1186-87):

He [Mr. Malackowski] certainly didn't quarrel with the 98 million dollar number as EBI's profits in this.

Further rebuttal summation by Orthofix's counsel, 5/29/97 Tr. 5353:4-8 (C.A. App. 1189):

These are the kinds of activities, ladies and gentlemen, that warrant an award of punitive damages. And in doing that, in calculating that, you can consider the amount that they gained, the 98 million.

APPENDIX C

STATE TORT REFORM STATUTES THAT CONSIDER THE PROFITABILITY OF THE DEFENDANT'S UNLAWFUL CONDUCT IN SETTING THE AMOUNT OF PUNITIVE DAMAGES

ALASKA STAT. § 09.17.20(c)(3) (West 1998): "[T]he fact finder may consider . . . the amount of financial gain the defendant gained or expected to gain as a result of the defendant's conduct."

KAN. STAT. ANN. § 60-3701(b)(3) (1998): "[T]he court may consider . . . the profitability of the defendant's misconduct."

KY. REV. STAT. ANN. § 411.186(2)(c) (Banks-Baldwin 1998): "[T]he trier of fact should consider the following factors: . . . the profitability of the misconduct to the defendant."

MINN. STAT. § 549.20(3) (1998): "Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including . . . the profitability of the misconduct to the defendant."

MONT. CODE ANN. § 27-1-221(7)(b)(iv) (1997): "[T]he judge shall . . . demonstrat[e] . . . consideration of each of the following matters . . . the profitability of the defendant's wrongdoing, if applicable."

N.J. STAT. ANN. § 2A:15-5.9 (1995): "[T]he trier of fact is to consider . . . the profitability of the misconduct."

N.D. CENT. CODE § 32-03.2-11(5)(c)(2) (1999): "[T]he finder of fact shall find by clear and convincing evidence that the amount of exemplary damages awarded is consistent with the following principles and factors: . . . the profitability to the defendant of the wrongful conduct

and the desirability of removing that profit and of having the defendant also sustain a loss."

OKLA. STAT. ANN. tit. 23, § 9.1A (West 1999): "[T]he jury, . . . may, . . . , give damages . . . based on the following factors: . . . the profitability of the misconduct to the defendant."

OR. REV. STAT. § 30.925(2)(c) (1998): "Punitive damages, if any, shall be determined and awarded based on the following criteria: . . . the profitability of the defendant's misconduct."